

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
October Term, 1944 DISTRICT OF COLUMBIA

FILED NO. 1944
No. 8872 **260**
Joseph W. Stewart
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WADE H. COOPER, *Appellant*

VS.

R. C. PARSONS, Receiver of the United States
Savings Bank, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

October Term, 1944

No. 8872

WADE H. COOPER, *Appellant*

vs.

R. C. PARSONS, Receiver of the United States
Savings Bank, *Appellee*

BRIEF FOR APPELLANT, WADE H. COOPER

Jurisdictional Statement.

The jurisdiction of the lower Court is involved under Title 11, Sec. 306 of the District of Columbia Code, 1940 Edition, Page 262, which vests in the said Court the right to hear and determine "all actions or suits of a civil nature at common law or in equity."

This is an appeal from a final order or final judgment of the District Court of the United States for the District of Columbia, entered June 23, 1944, in favor of Plaintiff, R. C. Parsons, Receiver, in the Court below, in Equity Cause No. 65,140 (App. 45). The jurisdiction of this Court is involved under §128 of the Judicial Code as amended Feb. 13, 1935, C. 299, §1, 43, Stat. 936, 28 USCA §225, p. 294.

And also under Title 17, Sec. 101, Page 421 of the D. C. Code of 1940.

Statement of the Case.

This is an appeal from the decision of the District Court overruling the motion of Appellant Cooper under Rule 56(a), F. R. C. P. (App. 45 & 55), for a summary judgment (App. 27), as the majority stockholder of the United States Savings Bank, for the sum of \$175,000. cash left over after payment of 100% in full to all depositors by the Receiver of the Bank within a composite or aggregate period of 13 months following the appointment of a receiver, and after a dissipation in alleged expenses of \$235,000.; and also an appeal from said order (App. 55), granting the motion of Appellee (plaintiff below) for a summary judgment (App. 45), holding that the Bank was due its depositors 6% interest per annum for the time they were out of their money equivalent to 11 months during the conservatorship and 13 months during the receivership (App. 3), though the records show that the Bank was four times solvent and could easily have paid all proven claims any day subsequent to the appointment of the Receiver, but for the arbitrary action of the former Comptroller in refusing to convert the assets into cash and disburse the proceeds as required by law (App. 5). This appeal grows out of a prolonged and involved litigation. We will endeavor to state the salient points as briefly as possible, relying upon opposing counsel to supply any important omissions.

By proclamation of the President the Bank was restricted from transacting business and was in the hands of a conservator from March 14, 1933 to Feb. 10, 1934, a receiver having been appointed on the latter date. The Savings Bank was organized and chartered in 1906 under the laws of the State of West Virginia, with a capital stock of \$100,-

000. divided into 1000 shares of \$100. each, of which Appellant Cooper was the owner of 560, with its principal place of business located in the District of Columbia (App. 3), where it did a successful banking business until restricted and a receiver appointed as already stated. On Aug. 10, 1937, Receiver Young, predecessor of Appellee Parsons, who was appointed to succeed Carter B. Keene, the first receiver who was permitted to resign following his emphatic refusal to sue the stockholders for the reason that the Bank was perfectly solvent (App. 7), filed this suit against the stockholders for a 100% assessment. 90% had already been paid and some time thereafter 100% was paid, and on Jan. 23, 1939, Appellee or his predecessor filed an amended bill seeking to collect interest alleged to be approximately \$223,000.00, but since admitted by Appellee to be approximately \$204,000. The other stockholders and Appellant Cooper denied that any interest was due by the Bank for various reasons, Appellant Cooper setting up numerous acts of the former Comptroller showing that the Bank was arbitrarily liquidated (App. 6, 7), and claiming that the Bank was always solvent, but more or less non-liquid, as all banks were for a time. After different appeals to the Court of Appeals by one side or the other, the stockholders (Cooper excepted), in November 1943 agreed to settle the alleged liability by the payment of \$13.25 per share, or approximately \$4,000., the Appellee Receiver to restore all the money, if it were finally determined that he was not entitled to the money, or that it was not needed. This proposition was accepted by the Receiver and duly approved by the lower Court (App. 50, 54). On Feb. 14, 1944, Appellant Cooper, owner of 560 shares of the stock, agreed to settle upon the same basis as the other stockholders, with the distinct understanding that he was not surrendering any rights, past or present, and was to be permitted to file a counterclaim immediately following the set-

tlement, which had been denied him by the lower Court in the previous litigation (App. 54). This settlement was approved by the lower Court on Feb. 14, 1944. The other stockholders and Appellant Cooper felt that the continued annoyance of the assessment suit had a nuisance value equivalent to the amount paid in the settlement, in view of the fact that none of their rights were being surrendered, though nuisance suits should not be tolerated by the Courts as being against public policy.

On the 1st day of March, 1944, Appellant Cooper filed his counterclaim, setting up the law and the facts, charging numerous arbitrary acts showing that the Bank was arbitrarily liquidated. This counterclaim did not seem to conform to the wishes of the Court (Mr. Justice Letts), and accordingly (in deference to the suggestion of the Court) permission was granted Appellant Cooper to withdraw this counterclaim and file a substituted counterclaim (App. 3). The substituted counterclaim was filed on April 6, 1944, in which Appellant Cooper charged that on Feb. 28, 1929, the Legislature of West Virginia enacted a law (App. 4) prohibiting any bank *organized and chartered under the laws* of that State from transacting business at *any place except its home office* in the State of West Virginia, and that on and after Feb. 28, 1929, the date of the passage of said Act, all the acts of the said Bank were *ultra vires* and that therefore the Bank was not liable for interest at all on and after the passage of the aforesaid prohibitive Statute. He further charged that if any interest whatever was due, it was at the rate of 3% to savings depositors, according to agreement, as provided in §28-2707 of the D. C. Code of 1940; and that by agreement, the demand depositors were not to receive any interest at all, as provided in §28-2701 of said Code.

Appellant Cooper further charged that the former Comptroller arbitrarily kept the Bank in the hands of a con-

servator for eleven months, using it to bolster the organization of the Hamilton National Bank of his own promotion, instead of proceeding to liquidate it, as, under the law, he was required to do, if he honestly believed the Bank was insolvent as he claimed, and, therefore, the Bank did not and does not owe any interest at all for this period of eleven months (App. 5). Appellant Cooper also charged that the Bank always had on hand ample assets good enough for any bank (App. 5), to enable it to pay all proven claims any day if the former Comptroller had so desired. He also charged that even after borrowing money from the R.F.C., the former Comptroller would hold it and refuse to disburse it for months at a time (App. 6). Finally, he set up numerous specific acts showing that the Bank was arbitrarily liquidated (App. 6, 7, 8); that the decree of the United States Court of Appeals declaring the Bank insolvent in the summer of 1936 was obtained by misrepresentation and deception in unlawfully injecting into the brief and argument of the Comptroller matters that had not been mentioned in the pleadings and, therefore, that the decree should be set aside. Specifically this was the case of *Bank v. Morganthau*, No. 6605, this Court, October Term 1935, 66 App. D. C. 234, 85 F. (2d) 811 (App. 8); that as a result of careful management and the denial of dividends by the stockholders, the Bank had built up a surplus of about \$400,000. for the protection of its depositors (App. 4); that after the payment in full of 100% to its depositors, and after an expenditure or dissipation of \$235,000. in alleged expense, the Bank still has a surplus in cash of \$175,000. which Appellant Cooper insisted, under the law and the rules of fairness, justice and equity, belonged to the stockholders of the Bank.

Following the filing of the substituted counterclaim by Appellant Cooper, Plaintiff Receiver or Appellee made a motion to strike certain portions thereof, which motion was

granted by the Court (App. ¹⁵45). Thereupon the Appellee filed an answer to such charges that he had not moved to strike (App. 15), admitting the law as stated by Appellant Cooper, but denying his conclusions as to the meaning of the law and denying certain of the other charges.

Subsequent to the filing of his answer, without withdrawing it, the Appellee urged in his motion for summary judgment (App. 32...) that all the remaining acts charged (which had not already been stricken), showing that the Bank was arbitrarily destroyed, were immaterial and irrelevant, and *res adjudicata* in Cooper v. Woodin, Bank v. Morganthau and Cooper v. O'Connor, though not a single fact in issue was singled out as having been adjudicated in either case. Upon hearing the motions for summary judgment, the Court denied the motion of Appellant Cooper and granted *in toto* the motion of Plaintiff or Appellee (App. 46). Thereupon Appellant Cooper moved to vacate and set aside the order, which motion was overruled (App. 46). The Appellant Cooper then appealed the case to this Court (App. 55). This is a brief recital of an involved litigation, but we hope to make the situation much clearer in our argument.

Statutes Involved.

"No banking institution chartered and authorized to engage in business under the laws of this State, shall hereafter install or maintain any branch bank, or engage in business at any place other than at its principal office in the State of West Virginia; or engage in any business other than authorized in this article." §3131, 1932 W. Va. Code, Act of Feb. 28, 1929.

"* * * The officers and directors of such non-resident banking institutions may conduct the banking business at such place or places outside of the State of West Virginia as they may be permitted under the laws of the jurisdiction in which such place or places are situ-

ated. The restrictions in the banking laws of this State contained as to establishment and maintenance of branch banks shall not be applicable to said non-resident banks, but no non-resident bank shall operate or maintain any branch bank in this State." §3224, 1937 W. Va. Code, Act of Feb. 4, 1937.

"The rate of interest in the District upon the loan or forbearance of any money, goods or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars for one year and at that rate for a greater or less sum or for a longer or shorter time; * * *." §28-2701 D. C. Code of 1940, and §28-2701 (Title 17, §1, 1929 Code (Act of March 3, 1901, 31 Stat. 1378, Ch. 854).

"In an action in the District Court of the United States for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage, the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the contract, if any, until paid." §28-2707 of the D. C. Code 1940 and Title 17, Ch. 1, §7 of 1929 Code (Act of March 3, 1901, 31 Stat. 1378, Ch. 854, §1184).

"From time to time * * * the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a Court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives, in proportion to the stock by them respectively held." 12 U.S.C.A., §194 (National Bank Act of 1878).

RULE 56. SUMMARY JUDGMENT.

- (a) A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

- (b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Statement of Points.

The different points submitted by Appellant Cooper are all set out in the Appendix, Pages 55, 56. These points, for brevity, may be consolidated into the following:

The lower court was in error in holding,—

- (a) that the acts of the Savings Bank were not *ultra vires* after the passage of the Act of Feb. 28, 1929 by the Legislature of West Virginia, prohibiting the Bank from engaging in business outside of that State;
- (b) that Appellant Cooper was estopped from relying upon the *ultra vires* acts;
- (c) that the Savings Bank was liable for interest, as claimed, on either the demand or savings deposits;
- (d) that the demand and savings depositors were entitled to 6% in direct violation of the law as stated in §§28-2701 and 28-2707 of the D. C. Code of 1940, and in violation of the respective contracts in question;
- (e) that the Bank was liable for interest for the 11 months during the conservatorship, and for the same period when the former Comptroller was using it to promote the organization of the Hamilton National Bank;
- (f) that the Bank was liable for interest for the period during which the former Comptroller arbitrarily refused to convert the assets into cash and distribute the proceeds as required by law, and in holding the Bank liable for interest for the periods when the former Comptroller actually had the cash in hand but arbitrarily refused to distribute it as required by law;
- (g) that the acts charged showing that the Bank was arbitrarily and fraudulently liquidated were immaterial, irrelevant and *res adjudicata*;
- (h) that the depositors should not be permitted to intervene by petition and urge a compromise;
- (i) that the Appellee was entitled to a Summary Judgment and the Appellant was not;

- (j) that the wasting of assets was immaterial;
- (k) and also in error in impairing the obligation of the contracts involved, contrary to the Constitution, and in violating the due process clause of the Fifth Amendment, in refusing to submit the issues of fact to a jury as demanded and in denying Appellant Cooper a fair and impartial trial;
- (l) The lower court was in error in all its conclusions both as to the law and the facts.

Summary of Argument.

Basically or fundamentally the final or ultimate question to be decided is as to who is the owner of \$175,000. cash remaining, the stockholders or depositors, after the payment of 100 per cent in full to the depositors in a composite or aggregate period of 13 months following the appointment of a receiver on February 10, 1934. This final decision is dependent upon a determination of the questions raised under Statement of Points.

We insist that the lower Court was in error in all its conclusions and that the Bank does not owe any interest at all and that this \$175,000. should be paid to the stockholders and this receivership ended for the following reasons:

1. Because the Legislature of West Virginia, the State of incorporation, on Feb. 28, 1929, passed an act prohibiting all banks *organized and chartered under the laws of that State* from transacting business at any place except its home office in the State of West Virginia.

This was an affirmative act of the State of West Virginia and prohibited this bank, as well as all other banks organized under the laws of West Virginia from transacting business except at its home office in that State, which means that all acts of the Bank subsequent to the passage of this act were *ultra vires* and void and without any binding force upon the Bank. The Bank was responsible for all acts prior to Feb. 28, 1929, but not thereafter, as it had been

prohibited by its creative power from transacting any business outside of the State. Whether this means that the directors or trustees were liable as partners subsequent to the passage of the prohibitive act of Feb. 28, 1929 is not in issue, as they have not been sued as partners. This was not the expiration of a charter as in the case of *Thompson v. Park Savings Bank*, 64 App. D. C. 308, 77 F. (2d) 955, but the prohibitive act of the State that gave the Bank its existence.

2. If the Bank is liable at all for interest, the savings depositors are only entitled to interest at the rate agreed upon, which was 3% before and after maturity, in accordance with §28-2707 of the D. C. Code of 1940, which specifically provides that in all cases where interest is payable by contract, "the *judgment* for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid."

It is admitted that the contract called for 3% to the savings depositors, but the lower Court, in error, ignored this statutory requirement entirely, and held that the savings depositors were entitled to 6%, instead of 3% according to contract. Judgments are obtained not before, but after maturity and the "judgment (after maturity) shall include interest * * * at the rate fixed by the contract, until paid." The language is too plain for any misunderstanding by anyone.

3. It is clear that the demand depositors, if the Bank is liable at all, which is denied, are to receive a fair and equitable rate under all the facts and circumstances, as held by our Supreme Court in the case of *Young v. Godbe*, 15 Wall. 552, where the Court said—"Courts of equity allow or withhold interest as under the circumstances of the case seems to them equitable and just."

It is admitted that by agreement the demand depositors *were not* to receive any interest at all. In *Kimball v. Williams*, 36 App. D. C. p. 43, our Court of Appeals declared

that the acceptance of the principal "will presume waiver of interest," where interest is not included in the contract. But §28-2701 of the D. C. Code of 1940 provides that in the *absence* of a *contract* for the loan or forbearance of money or goods, the judgment shall include interest at the rate of 6%. So that, if the two sections of the Code cited are literally followed, the savings depositors would receive 3% and the demand depositors by agreement, would not receive any interest at all. If the Bank is liable at all, we would like for all the depositors to receive the same rate of interest, if possible under the circumstances. The demand depositors would not receive any interest at all, by agreement, and as there was no contract for interest, they would not receive any interest under *Kimball v. Williams, Supra*, for the reason that the acceptance of the principal "will presume waiver of interest." But, if any interest is to be paid, we are of the opinion that this Court, if possible, should fix a reasonable rate for all as stated in *Young v. Godbe, Supra*, and as stated in *Nolte v. Hudson Nav. Co.*, 8 F. (2d) 859,—

"* * * interest * * * must be reasonable and conform to custom in the community in dealings of this character,"

or refer the matter to the Auditor to hear proof and report what a fair rate would be, if any is to be paid to either class of depositors.

4. The purpose of the law in giving the Comptroller power to appoint a receiver is to enable him to convert the assets into cash and distribute the proceeds to the creditors or depositors, 12 U.S.C.A. §194. The lower Court was in error in holding that the delay was immaterial and irrelevant.

The courts have repeatedly held that the Comptroller should act promptly and that no interference should be allowed with any of his acts except for bad faith or fraud, in order that he may proceed promptly and expeditiously. But what happened in this case? He deliberately and

arbitrarily held this Bank in the hands of the conservator from March 14th, 1933 to Feb. 10, 1934, using it to promote the organization of the Hamilton National Bank (App. 5). He did not have the slightest intention of ever allowing this Bank to reopen and had his conservator to file a Petition in the District Court to sell \$930,000. of the assets of this Bank (App. 9) to the bank of his own promotion at face value, dollar for dollar. We respectfully insist that it would be grossly unfair to charge the Bank interest for this period of 11 months or to charge it with interest on the \$930,000. which the Comptroller recommended and urged the Hamilton National Bank to purchase at par, (Cooper v. Woodin, 63 App. D. C. 311, 72 F. (2d) 179). True, the Court (Mr. Justice Bailey) refused to approve the sale, but the former Comptroller urged it just the same.

5. The Comptroller in his digest of the National Banking Laws or Decisions, admits that under the law no interest is due during the conservatorship and cites the case of Richman v. Church, 76 F. (2d) 344, in support thereof, but his receiver is now contending to the contrary.

Regardless of this, we insist that under the law and rules of fairness, equity and justice the lower Court was in error and that the Bank should not be charged with interest for the 11 months delay in liquidation as already explained.

6. The lower Court was without authority and violated Clause 1, §10 of Article 1 of the Constitution of the United States, in abrogating the contract to pay savings depositors 3% and increasing the rate to 6%, as well as a violation of the law.

The Contract was for 3%, and §28-2707 of the 1940 D. C. Code defines the meaning of the contract. The lower Court was therefore without authority to nullify the existing contract in the manner it did, as it was the impairment of the obligations of a contract.

The Court was equally without authority to increase the rate of demand depositors from *nothing* to 6%, as that action was also an impairment of the obligations of contracts prohibited by Clause 1, §10, Article 1 of our Constitution, as well as a violation of the law.

7. The various acts charged, (App. 6, 7, 8), showing that the Bank was arbitrarily wrecked and destroyed, are specific and definite, and the lower Court was wholly in error in holding that they were *res adjudicata* or immaterial and irrelevant, as not one of them has ever been passed upon, as stated in the substituted counterclaim.

On the basis of these charges, admitted by the motion to strike, Appellant is entitled to a judgment. After answering a number of the charges, Appellee, without withdrawing his answer, urged that they were *res adjudicata*, immaterial and irrelevant, and the Court sustained him, disregarding his answer and the law.

8. The record shows that a sum in excess of \$50,000. was dissipated and, as we insist, wasted since the institution of this assessment suit, and that \$30,000. was lost as the result of negligence in failing to collect interest and pay taxes. (App. 7.)

Certainly the Bank is entitled to a credit for these amounts, if it is to be charged with interest at all.

9. Certain of the depositors sought permission to intervene in this case by Petition and urge a settlement on a basis of 3% to all. The lower Court was in error in refusing permission, as any interested party has a right to intervene and be heard.
10. The lower Court was in error in all its conclusions, both as to the law and the facts.
11. The Court, was strongly prejudiced in favor of the Appellee Receiver, and should have voluntarily refused to hear the motions or to try the case at all.

He had placed himself in an impossible situation by ordering the sale of the bank building at the price of

\$45,000. as urged by Appellee. Appellant Cooper vigorously protested against the sale of the building, as it was earning between 9 and 12 per cent at the price of \$45,000. and because a sale was not necessary until this litigation ended. The receiver insisted that \$45,000. was all the building was worth and that it should be sold. Mr. Justice Letts promptly overruled Appellant's protest (App. 51). The building was sold at auction at and for the price of \$80,000. cash, as a result of the activities of Appellant's friends. But Mr. Justice Letts had placed himself in the unfair and undesirable position of having to hold that 6% interest was due to all depositors in order to sustain his action in selling the building. (See his Order in Mis. #40, Vol. 2 of the District Court.) The effect was to deny Appellant Cooper a fair and impartial trial and was a violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

Argument.

I.

Ultra vires acts.

All the acts of the Savings Bank in the transaction of the banking business in the District of Columbia subsequent to the passage of the Act of Feb. 28, 1929 by the Legislature of West Virginia, were clearly *ultra vires*, for which the Bank cannot be held liable. The lower Court was in error in holding to the contrary.

(a) MINOR POINTS. In their brief, filed in the lower Court, about May 12, 1944, counsel for Appellee Receiver made the point—

“that neither this provision nor any other provision of the West Virginia law provides any penalty for non-compliance with this section, nor is it stated anywhere in the laws of West Virginia that acts done in

violation of this section shall be *ultra vires*, void and of no effect, and that such acts were not subject to a collateral attack."

This Court well knows that it is not necessary for West Virginia or any other State to provide a penalty for the violation of a prohibitive statute or non-compliance or for the commission of *ultra vires* acts, or to declare that *ultra vires* acts are void and of no effect. The law is too well settled to consume the time of this Honorable Court in discussing these minor points. The maxim *res ipsa loquitur* would seem to apply here. The fact that the Act was passed prohibiting all banks from engaging—

"in business at any place other than at its principal office in the State of West Virginia,"

rendered all subsequent acts *ultra vires*, regardless of any penalty for its violation and regardless of any declaration regarding the effect of the Statute.

(b) STATUTORY CONSTRUCTION. Opposing counsel later insisted that as the Savings Bank, in this case, was incorporated in West Virginia in 1906, with its principal office in the District of Columbia, that the Act of 1929 does not apply to it, but only to banks engaged in business in West Virginia. The scope of the section, they insist, is indicated by the title,

"Branch Banks Forbidden; Bank Not to Sign Indemnity Contract or Pledge Its Assets to Indemnify a Surety; Exception as to Guarantee of Federal Deposits or State and Divisions Thereof."

The title was very likely written by some enrolling clerk or stenographer, but the Legislature enacted the body of the bill and not its title, and the body of the bill is what counts in legislation and not the title, as this Court well knows. Titles are for convenience, but legislating or the enacting clause creates the law.

The Court will observe that there are several subjects embraced in the title, and that the effect of the law is to prohibit branch banking, as well as to prohibit engaging—

“in business at any place other than its principal office in the State of West Virginia * * *.”

Regardless of the purpose of the enrolling clerk or the writer of the title, into which we cannot inquire, the body of the Bill or Act is perfectly clear and without ambiguity.

As was said in *Cornell v. Coyne*, (1904) 192 U. S. 418, 430, 48 L. Ed. 504, 509,—“The title is no part of an act, and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous, * * *. The ambiguity must be in the context and not in the title, to render the latter of any avail.” *U. S. v. Oregon & C. R. Co.*, 164 U. S. 526, 541, 4 L. Ed. 541, 545. See also *Price v. Forest*, 173 U. S. 410, 427, 43 L. Ed. 749, 755, and cases cited.

As stated by Mr. Justice Day in *Strathearn v. Dillon*, 252 U. S. 348, 64 L. Ed. 607,—“But the title of an Act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt.”

The meaning is clear that *all banks* were prohibited, from engaging in business at any place outside of the State of West Virginia.

Nine years later, Feb. 4, 1937, (§3224, 1937 Code of West Virginia), the Legislature of West Virginia enacted a law, the effect of which was to repeal part of the act of Feb. 28, 1929. It is perfectly clear that this section was for the purpose, and has the effect, of repealing part of the act of Feb. 28, 1929. Thus it appears that the prohibitory act of 1929, was well understood, as the act had to be read three times before its passage, as well as recommended by the Banking and Currency Committee, and that the Legislature of 1937, or nine years later, recognizing the legality and the force and effect of the 1929 Act, proceeded to repeal that part of the act relating to the business of non-resident banks, by the passage of the Act of 1937,—or several years after the Savings Bank in the instant case had been suspended.

Opposing counsel have always claimed, until recently, that the Savings Bank was organized and chartered under the laws of West Virginia. They so stated in their original bill in 1937; they so stated in their amended bill in January 1939, they so stated in their answer (App. 16); the record made by them shows that the State of West Virginia gave the corporation its existence and is, therefore, the law of its existence. They cannot, in equity and good conscience, now be heard to question the verity of their own records or to deny or change them in any particular. As a matter of fact, the charter gave the corporation the right to engage in business in the District of Columbia, but not "solely" as urged by opposing counsel and, in error, sustained by the lower Court. It had the right to engage in business in West Virginia, which right was not surrendered and was, therefore, reserved. Hence the necessity, it was thought, of the passage of the prohibitive act of Feb. 28, 1929, or all non-resident banks would have retained the right to open branches in West Virginia, while the resident banks could not. The Act could have been drawn differently, but at the time it meant what it said.

(c) SUPERVISION OF COMPTROLLER. The lower Court in error, held that the Savings Bank in this case was not engaged in business under the laws of West Virginia, as it was subject to supervision by the Comptroller of the Currency. This Court has repeatedly held that the law of the State where the bank is incorporated controls and that this Court could not read into the local statute certain provisions of the National Bank Act; that the Comptroller had the power of examination and supervision as well as the power to appoint a receiver, but that the law of the State of incorporation controlled as to liability.

In *Hamilton v. Bergling*, 66 App. D. C. 85, 85 F. (2d) 249, this Court, in referring to *Harper v. Moran*, said: " * * * we think the rule announced in the *Hamilton-Offutt* case controls in this, and we must therefore

have recourse to the laws of West Virginia to determine the liability of the stockholders here." (See *Hamilton v. Bergling*, *supra*; *Bergling v. Wardell*, (1940) App. D. C., 115 F. (2d) 948; Also see the leading case of *Relf v. Runkle*, 103 U. S. 529, holding that the law of the State to which the corporation owes its existence is the law of its existence. We do not know of any case to the contrary.)

(d) **BANK IS NOT LIABLE.** The lower Court did not undertake to hold, as we understand, that the Bank was liable for its *ultra vires* acts, but erroneously denied that the acts complained of were *ultra vires*. We think that it is perfectly clear that the acts of the Bank subsequent to the passage of the prohibitive act of Feb. 28, 1929 were *ultra vires*; and that the Bank is not liable for same. In this view, we have the support of the positive opinion of all of opposing counsel as expressed in their brief in *Thompson v. Park Savings Bank*, this Court, October Term 1934, No. 6328, p. 68, wherein they say:

"* * * that irrespective of Statute, the general rule of law requires an accounting from directors who have continued a business subsequent to the expiration of the charter life and corporate existence of a corporation, and that the overwhelming weight of Federal and State authorities charge individuals who conduct an entire business *ultra vires* of the corporate powers with individually and personally liability for all obligations thereby created."

These same attorneys insisted that the foregoing expressed opinion was the law in the *Park Savings Bank* case. They now take a contrary position. They are indeed, in the difficult and paradoxical position of a man who approbates and reprobates the same transaction. In the *Park Savings Bank* case they would hold the directors individually liable, but in this prohibitive situation in the instant case, they would hold the Bank liable. They admit and deny, they affirm and dissent. They are in the position of the hydroheaded man facing both ways. On Page

31 of their Brief, filed in this Court July 31, 1936, No. 6635, (same matter), these gentlemen, in effect, repeat and re-affirm the positive statement already referred to, with the added name of our young friend Mr. Donald Kistler, the first brief being signed only by Mr. Kremer, Mr. Springston and Mr. Bingham.

The books are full of cases on the subject, but a leading case is the case of the Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55, where Mr. Justice Gray, speaking for a unanimous Court, stated the rule to be (p. 64):

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers. And the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligations of everyone contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. * * *

"When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the Contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was *prohibited* by those laws."

In the case of McCormick v. Seelberger, 73 Ill. App. 87, 89:

"It was held (in a previous case) that although the corporation had proceeded in its organization far

enough to constitute it a *de jure* corporation, yet that it had not received the formal certificate of the Comptroller of the Currency and could not therefore commence a banking business, and that the execution of the lease being incidental to a banking business, the transaction was null and void and the corporation was not bound. The present suit was then brought against appellees, the directors of the Bank, charging liability upon the ground that they had knowledge of and consented to the execution of the lease, and directed the same to be made.

The Courts held that the plaintiff was entitled to recover rent reserved in the lease upon the principle that the directors had transacted business for the Bank when it was without the formal certificate from the Comptroller, and therefore prohibited from engaging in the banking business, they were liable *ex contractu* upon an implied warranty that the Bank had the right to engage in such business."

In this case, the directors knew that the formal certificate had not been issued. Mr. McCormick first sued the Bank. The case is reported in 61 Ill. App. 33, 162 Ill. 100 and 165 U. S. 538.

The doctrine that the corporation cannot be held for *ultra vires* acts, as stated in the above named cases, is reaffirmed by the Supreme Court in the case of the First Nat'l Bk. v. Converse, 175 U. S. 40, as follows:

"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the best interest of the public that corporations should not transcend the limits of their charters: that the property of the stockholders should not be put to the risk of engagements which they did not undertake; that, if the contract is *prohibited* by statute," (as this is), "every one dealing with the corporation is bound to take notice of the restrictions in its charter."

In Corpus Juris at Page 1228, Annotations, we find this—

"The object of a *prohibitory* law cannot be defeated by estoppel nor the legally impossible accomplished."

The trouble with opposing counsel is in their failure to differentiate between an act positively *prohibited* by stat-

ute, (as this is), and an act not prohibited by statute. There does not seem to be any question about the non-liability in all cases where there is a positive *prohibitory* statute or where the right to transact business is positively *prohibited* as in the instant case.

(e) ESTOPPEL. The lower Court was in error in holding, as urged by Appellee, that Appellant Cooper was estopped, because he had received dividends from the Bank and, therefore, could not be heard to deny the liability of the Bank because of its *ultra vires* acts. This is a novel proposition. This is not a suit against Appellant Cooper. He has settled any possible liability against him, along with the other stockholders as already explained. He has always relied upon the *ultra vires* acts in the claim for alleged interest.

This Court has already had occasion to pass upon this question of *estoppel* in two similar Bank cases. In the case of *Dunn v. O'Connor, et al.* (1937), 67 App. D. C. 83, this Honorable Court, in discussing the action of the Comptroller in wholly disallowing the claim of the Commercial National Bank for a large sum against the Continental Trust Company, upon the basis that the Trust Company could not lawfully become a stockholder of the Commercial National Bank, said,—

“Assuming the facts to be as stated we think the ruling of the Comptroller is correct.”

And on Page 83, *Dunn v. O'Connor, Supra*, this Court said,—

“It (the Trust Co.) received from time to time dividends from the Commercial aggregating \$105,000. on Commercial stock and presumably distributed these to its own stockholders as dividends, * * *.” Continuing, this Court said,—“there can be no doubt that * * * the debts * * * created *ultra vires* the corporation, the stockholders of the Continental have an interest entitling them to maintain a suit. * * *.” This was a well considered case, the opinion having been delivered by our present Mr. Chief Justice Groner.

And in *Thompson v. Park Savings Bank*, 68 App. D. C. 276, this Court said,—

“* * * Thereafter until it was closed, it (the Bank) continued to pay its taxes and license fees to Alabama and to the District of Columbia, to declare dividends, to be examined by the Comptroller, to publish reports of its condition, etc.”

In this *Park Savings* case the stockholders, according to the record (P. 97), paid a 100 per cent dividend on one occasion during the period in question, but there was no holding to the effect that their rights were cut off or that they could not be heard. The Court below, in the instant case, failed to differentiate between a regular business carried on in good faith, but positively prohibited, and the case of a single act or a single transaction or an implied power as is illustrated in the case of *Cassey v. Galli*, 94 U. S. 673, 24 L. Ed. 168 cited by Appellee, and the case of *American Surety Co. v. Moran*, 64 App. D. C. 308, 77 F. (2d) 955, cited by Appellee, both of these cases involving a single transaction, as does the case of *Bank of Tupelo vs. Stonum*, 281 S. W. 110, Missouri Court of Appeals in 1926, in opening a branch bank, a single transaction and an implied power. None of the cases cited by Appellee or the lower Court apply to the facts in the instant case. If the Savings Bank in the instant case, could disregard the law one year, it could disregard it one thousand years or run on, like *Tennyson's Brook*, forever, which would seem to be unthinkable to a fair and legal mind.

As was well said by Chief Justice Fuller, speaking for the Supreme Court in the case of *Union Pac. R. R. Co., v. Chicago, R. I. & P. R. R. Co.*, 163 U. S. 564 (41:265) (271),—

“A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the doctrine of estoppel.”

In the old case of *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 335, 23 L. Ed. 927, our Supreme Court re-

viewed the doctrine of estoppel and laid down the principle that in such cases there must generally be some intended deception, as witness the language of the Court—

“It is difficult to see where the doctrine of estoppel comes in here. In the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, * * *.”

“In all these cases,” says Story, “the doctrine proceeds upon the ground of constructive fraud or of gross negligence which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief * * *.”

There is no suggestion of intended deception or fraud in the instant case. Appellant Cooper offered to admit every fact and every act in the record in this case regarding the payment of dividends and the publishing of reports and all rules and regulations and save the expense of same, but opposing counsel would have the exhibits placed in the record an illustration of the dissipation of funds, but which seems to be beyond any power to prevent.

(f) A PREFERENCE. It was insisted by Appellee's counsel and in error approved by the lower Court, that it would be giving a “preference” to Appellant Cooper, to grant his motion and allow him as a stockholder to collect any of the cash remaining after the payment of 100 per cent. This is an unusual species of reasoning, as all the stockholders are interested in the outcome of this suit as has already been explained with reference to the settlement of the nuisance suit. This “preference” talk carries with it the implication that the stockholders are to be condemned for operating a sound and solvent bank and for denying themselves dividends to the extent of approximately \$400,000. (App. 4) in order to protect the funds which the depositors had entrusted to the Bank; that was not a “prefer-

ence". The West Virginia law only required a 20% surplus as against a capital stock of \$100,000. (Code of West Va. 1923, Acts of 1913) and, therefore, the stockholders, by order of the directors, could easily and legally have withdrawn just about \$350,000 of this surplus and still have left double the legal requirement, but they did not do that; they denied themselves for the protection of those who trusted them, notwithstanding a dissipation and wasting of the assets to the extent of \$235,000, of which this firm, (Kremer & Bingham), will have indulged to the extent of approximately \$50,000 or much more than the traffic should bear.

Instead of commending Appellant Cooper and the other stockholders for voluntarily denying themselves, as already stated, the stockholders are to be stripped of everything, stripped of their stock, or stripped of \$500,000. plus all good will of a quarter of a century accumulation. As a matter of fact, equity and good conscience would seem to direct that all this surplus be turned over to the stockholders, in view of the fact that they voluntarily protected the depositors to the extent mentioned. We are glad that the depositors do not feel that it is a "preference", for they have been most generous in their expressions of gratitude, and not one of them has ever expressed a desire for interest or demanded any—not one—but have denounced the act of closing the Bank as unfair and arbitrary.

(g) OTHER CLOSED BANKS. Appellee says 400 other closed banks have been required to pay interest, including eight other banks in the District of Columbia. The only inference to be drawn from such a statement is the fact that all these banks were perfectly solvent and wrongfully and improperly closed. This does not mean that the former Comptroller was responsible for all this tying up of the money of the depositors and squandering and wasting of the assets of the stockholders, but it does

mean that he had a lot of examiners who were "on the spot", as they felt they had to close some of the banks in every district in order to make the public believe that they had complied with the suggestion of the President to open only sound banks; they did not examine the banks for lack of time. This caused the examiners to play favorites, as was done in Washington. All the unopened banks in Washington appear to have paid 100 per cent and interest, except the Park Savings, while it is of record that all the opened banks, except one small one, had to be sustained by the R. F. C., from the largest to the smallest without exception. The purpose in injecting these statements into this record is obvious. The wrongful closing of the 400 solvent banks does not justify the continuance of such a practice. These other Washington banks frankly stated that they were not in position to oppose the imperial power of the Comptroller, as he appeared to be a law unto himself.

II.

Rate of Interest if any.

The lower Court was in error in allowing any interest whatever on demand deposits in violation of the agreement that no interest was to be paid; and also in error in allowing interest on the savings deposits in excess of 3% as agreed, in direct violation of §28-2707 of the D. C. Code of 1940.

(a) **THE STATUTE**—For some time prior to the year 1901, the rule or the custom in the District of Columbia, seems to have been to allow interest at the rate agreed upon up to the date of maturity, and thereafter at the legal rate as fixed by the statute. This is apparent from a number of cases, including the case of *Presby v. Thomas*, 1 App. D. C. 171, (1893); *Lockwood v. Lindsey*, 6 App. D. C. 396 (1895); and lastly, *Richards v. Bippus*, 18 App.

D. C. 293, which was some time prior to the enactment by Congress of §28-2701 and §28-2707 of the D. C. Code of 1940.

(b) **DEMAND DEPOSITS**—§28-2701 specifically provides that the rate of 6% shall be allowed "in judgments and decrees in the absence of an express contract as to such rate of interest." It is charged by Appellant Cooper and admitted by Appellee Parsons, in his answer, that by agreement, the demand deposits were not to receive any interest. In Para. 5 of the substituted Counterclaim (App. 4), is this:

"That said Savings Bank accepted both savings and demand deposits; that by agreement with the savings depositors they were to receive 3% per annum on their accounts and by agreement with the demand depositors they were not to receive any interest at all on their accounts."

In answer to said Para. 5, Appellee Parsons (App. 17) says:

"Plaintiff admits the factual allegations of Para. 5 of the substituted Counterclaim, and states further that the complete agreement between the bank and the savings depositors as to interest was set forth in the pass books issued to said depositors, as appears, for example, from Savings Department Account Book No. 46239 attached hereto as Exhibit B and made a part hereof by this reference."

It will, therefore, be observed that, by agreement, the demand depositors were not to receive *any* interest. Appellant Cooper respectfully insists that this agreement is in accord with §28-2701 and that the lower Court was in error in allowing any interest at all on the demand deposits, in the face of the admitted agreement that they were not to receive any interest.

It is a little difficult to discuss one of the sections referred to without referring to the other section also.

(c) **ENGLISH CASES.** That no interest should be paid on demand deposits is made clear in the case of Col-

ton v. Bragg, 15 East. 226, 227, reported in Vol. 14 of English Ruling Cases, Anno. (1916) p. 543 where Lord Ellenborough, Ch. J., said,—

“* * * Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen years, and I have now sat here for more than nine years; and during this long course of time no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has been ever given.”

And continuing, the Lord Chancellor, on Page 544, said—

“The judgment of Lord Mansfield in the case of Robinson v. Bland, and of the eminent Judges who sat with him shows that interest is not due without a contract for it.”

And Grose, J. in the same case,—

“During all my experience I have never known interest given upon money lent, or upon money due for goods sold or in any other cases but upon a contract for interest expressed or implied.”

And Bailey, J.—

“I entirely agree with the rest of the Court.”

Rule absolute for entering a non-suit.

In the instant case, there was no agreement to pay interest, but on the contrary there was an agreement that no interest on demand deposits should be paid. If A borrows \$1,000 from B, *without* a promise to pay interest, would A be required to pay any interest, even under §28-2701, *supra*? Under these English cases he would not. It would, in fact, be an invasion of the constitutional rights of A, as it would be an impairment of the obligations of a contract. But if A promised to pay \$1,000 *with interest*, omitting the rate, then the legal rate of 6% would prevail, as stated in §28-2701.

In Kimball v. Williams, 36 App. D. C. 43, long subsequent to the passage of the two sections of the Code

referred to, and long after the case of *Richards v. Bippus*, 18 App. D. C. 293, our Court of Appeals distinctly stated that where the contract called for interest, then interest must be paid, but the acceptance of the principal "will presume waiver of interest" where interest is not included in the contract. Witness the language of the Court—

"We think this distinction between the right of separate action to recover interest as a stipulated part of the consideration, as in the present case, and a right of action to recover interest as a mere incident to the debt, as damages for failure to pay the principal consideration, is a fixed rule in this country, to which there is no exception. We have found no authority to the contrary."

"Where money is retained by one man against the declared will of another, who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of money, to allow interest as compensation to the creditors for such loss. Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt. The right of action is the right to compel the payment of the money which is being retained. When he who has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action cannot be maintained, the opportunity to acquire a right to damages is lost." (To the same effect are *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 28 L. ed. 109, 3 Sup. Ct. Rep. 570; and *Redfield v. Bartels*, 139 U. S. 694, 35 L. ed. 310, 11 Sup. Ct. Rep. 683)" And *Stewart vs. Barnes*, 154 U. S. 456 is even more positive than the above case.

But the Court will please to bear in mind that in the case at bar there was a specific agreement that *no interest* would be paid on demand deposits.

One more English case on demand deposits: In *Cook v. Fowler* (H. L. 1874), Vol. 14, p. 540, *English Ruling Cases*, the Rule was said to be,—

“By the common law of England, there is no right to interest upon money except by contract. In an ordinary contract for repayment of money lent or for payment of goods sold, there is no *implied* contract for payment of interest.”

(d) SAVINGS DEPOSITS. The two sections of the D. C. Code to which we have already referred, according to the records, were enacted March 3, 1901, §28-2701 as already explained, and §28-2707 for the purpose of preventing judgments for more than the rate agreed upon in the contract as this latter section requires that,—

“* * * the *judgment* for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.”

Judgments are not obtained *before* but *after* maturity, and this section requires that “the judgment (after maturity) shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.” Therefore, we respectfully insist that the lower Court was clearly wrong in increasing the interest rate to 6% in violation of this section 28-2707, as the rate agreed upon was 3% and not 6%.

Opposing counsel urged that *Richards v. Bippus*, 18 App. D. C. 293, *Supra*, was persuasive, if not controlling, in the matter. But *Richards v. Bippus* was sometime prior to the enactment of the two sections referred to and is no more persuasive than the other cases referred to, all of them being prior to the change in the law. The effect of the holding of the lower Court, is that the law remains the same as it was prior to this change caused by the enactment of the two sections under discussion, which is utterly untenable and unreasonable. Why enact the two sections? Why make the change? There is always a reason for the passage of any statute. It seems to be manifest that the purpose of enacting §28-2707 was to protect debtors in distress, without distinction as to corporations or individuals.

§28-2707 prevents an oppressive creditor from unfairly imposing upon an unfortunate debtor by refusing to insist upon payment as long as the statute does not run against him, but finally demanding payment and a judgment for double the amount of interest agreed upon. We asked the Court below (Mr. Justice Letts), if a man were sued on a 3% note for \$10,000 two years after maturity, would he grant a judgment for 3% as agreed upon, in accordance with §28-2707 *Supra*, or would he disregard the law and double the rate agreed upon? His answer was a pleasant smile.

In the D. C. Code of 1925, §1184, Page 345, appears this same §28-2707 of the D. C. Code of 1940 under discussion, followed by a reference to the case, *Metzger v. Metzger*, 35 App. D. C. 389 (1910), and then this—

“*Prior to Code*, see *Richards v. Bippus*, 18 App. D. C. 293,” which shows what the law was prior to the enactment of §28-2707, *supra*.

On the savings deposits it is agreed that 3% per annum was to be paid, and §28-2707 specifically requires, in such cases,—

“* * * the judgment (after maturity) for the plaintiff shall include interest on the principal debt from the time when it was due and payable at the rate *fixed* by the contract, if any, until paid.”

The purpose of this section, as already stated, was to prevent the oppression of unfortunate debtors in distress, as is well illustrated in the English case of *Cook v. Fowler*, L. R. 7 H. L. 36, 37, reported in Vol. 14 of *English Ruling Cases*, Annotated (1916), p. 555. This was a case where the borrower had contracted to pay 5% for one month on 1330 pounds. The borrower died before the month had passed. The lender kept quiet for four years and then insisted upon 5% per month for the entire four years. The lower Court allowed 5% per annum and not per month, which was affirmed by the House of Lords, Lord Hatherly, saying,—

“* * * or they (the jury) may even allow *nothing* in case they are of opinion that the delay of payment has been occasioned by the default of the holder” (lender) “that is the holder of the instrument.” In this case Lord Selborne said,—

“I entirely agree in the motion which my noble and learned friend upon the woolsack has submitted to your Lordships.”

This seems to be a fair illustration of the reason prompting the passage of §28-2707, *Supra*.

(e) A STATE BANK. The Honorable Court will please to bear in mind that the Bank in the instant case is a State Bank and not a National Bank, and that the general principle of *lex loci contractus* as well as the law of the forum controls; that the two sections of the D. C. Code of 1940 under discussion control in this case as urged by Appellant Cooper, and not the laws of West Virginia or the National Bank Act as claimed by Appellee in their Amended Bill filed January 23, 1939 (App. p. 1). In *Lockwood v. Lindsey*, 6 App. D. C. 401 (1895) the Court held that,—

“* * * the general principle of *lex loci contractus* controls in all matters relating to the execution, the nature, construction and validity of the contract, but the mode of suing, and the time of suing, must be governed by the law of the forum where the action is brought; and all matters relating to its performance are controlled and regulated by the law prevailing at the place of performance;” “the rule *locus regit actum* prevails.”

(f) LACHES. In the instant case, Appellee in his amended bill of 1939, relied upon the laws of West Virginia and the National Bank Act, (App. p. 1), but the laws of West Virginia never required any payment of interest by insolvent or alleged insolvent banks, until the case of *Hoffman v. Unger* (W. Va. 1943) 24 S. E. (2d) 911. Appellee should be barred by *laches* from maintaining his position that interest should be paid. No interest was allowed under any holding by the Supreme Court of West Virginia or any statute of that State. Can the Appellee withhold assets lawfully belonging to the stockholders, under the

West Virginia Law until the interest law is amended by the Supreme Court of West Virginia in the Spring of 1943, and then, after all these ten years, come in and lawfully claim interest under the law of the forum, which controls as pointed out by Appellant Cooper? It would seem that laches would bar him, especially in view of the dissipation and wasting of the assets which we will discuss a little later.

(g) EQUITY. In this case, it appears that Law and Equity have concurrent jurisdiction, and that this Court has the inherent power to do what equity and good conscience requires under the facts and circumstances. There is no question about the bank having been four times solvent, as a matter of fact, the only question being as to whether its closing was the result of bad judgment or arbitrary, which we will discuss a little later. The authorities indicate that this Court has the power to fix a fair rate of interest if any, or refer the case to the Auditor to fix a fair rate, if any.

If the rules or principles of equity are to prevail in this case, 1% would be the highest rate allowed. In *Jackson County v. U. S.*, 308 U. S. 352, the Court held that no interest should be allowed, stating,—

“The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld * * *, but is given in response to considerations of fairness, and is denied when its exaction would be inequitable.”

In *American Tobacco Co. v. So. Carolina Nat. Bk.*, 15 F. Supp. 215, plaintiff claimed interest against the bank and the Court allowed interest at 2%. In *American Ins. Co. v. Lucas*, 38 F. Supp. 896, 925, the Court (3 Judges) held,—

“Interest will be allowed or denied ‘in response to consideration of fairness.’ ”

In *U. S. v. Rodiek*, 120 F. (2d) 760, 761, the Court said,

“* * * interest is recoverable only in response to consideration of fairness.”

The leading case relied upon by Appellee is the case of *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, p. 876, where the Supreme Court stated,—

“* * * we see no reason to deny to the creditor as against the shareholder the same right to recover interest, which, according to the nature of the *contract* or debt, would exist as against the bank itself * * *.”

—which is 3% on savings and nothing on demand deposits. In *Bank v. Morganthau*, cited by plaintiff, the Court of Appeals, (66 App. D. C. 234), stated,—

“* * * their computation, however, excludes from consideration the interest which has accrued upon the debts of the bank *since the date when the receiver took possession of it.*”

In *American Surety Co. v. Bethlehem Nat. Bk.*, 86 L. ed. 231, 233, the Court said,—

“* * * the claims must manifestly be estimated as of the same point of time * * * the declaration of insolvency.”

which certainly excludes the conservatorship period, the purpose of a conservator being for rehabilitation and not destruction as our friends seem to think.

“If the full amount of all claims is at hand to be paid, the bank is *not insolvent* and should be *turned over to the stockholders* or liquidated under their direction rather than being liquidated by the Comptroller of the Currency.” (9 *Zollman on Banking* § 764, p. 109.)

“Even if the Court had jurisdiction (the Comptroller) over the subject matter and the parties it seems a harsh rule that the defendant whose property has been so improperly taken from him should pay the receivership fees.” (1 *Clark on Receivers*, 2d Ed., § 641, p. 884. And continuing on Page 885, same authority)—“However, even in such cases, when the plaintiff acted fraudulently or wilfully in securing the appointment, he may have to pay the expenses of the receivership and receiver’s fees.”

“* * * interest is allowed in consideration of fairness and must be reasonable and conform to custom in the community in dealings of this character,” (*Nolte v. Hudson Nav. Co.*, 8 F. (2d) 859; *Young v. Godbe*, 15 Wall. 562, 565.

In 1937 the Legislature of West Virginia (House Bill No. 400, Chap. 10), passed an Act amending Article 8, Ch. 31 of the Code of West Virginia by adding thereto § 32(b), providing—

“* * * that in the administration by receivers of the assets of insolvent banking institutions having deposits of moneys belonging to the State of West Virginia, no greater rate of interest shall be paid on such deposits than that paid for the same period or periods on the same class or classes of deposits by solvent banking institutions, operating in the usual course of business.”

The highest rate paid by banks and trust companies in the District is 1% on savings and nothing on demand deposits. (See Affidavit of Appellant, App. p. 55.) The foregoing Act shows that the State of West Virginia desires to be fair and reasonable, as we are sure this Court is, and having the power, it is our hope that this Honorable Court will take action similar to the State of West Virginia, which had security for its deposits.

The law of West Virginia, the place of incorporation, regarding interest appears to be the same as § 28-2707 *Supra*, requiring that the agreed rate shall prevail in all judgments and decrees.

In *Pierpont v. Pierpont Admr.*, 71 W. Va. 431 (1912), the Supreme Court said,—

“Interest being the subject of contract, our cases hold that where interest is contracted for at less than the legal rate, that rate will control after maturity and judgment as well as before.”

In *Morris v. Bear*, 72 W. Va. 1, 78 SE 371, the Supreme Court said,—

“It is error to decree interest at 6% when the agreed rate is less.”

The case of *Hoffman v. Unger*, *Supra*, decided by the Supreme Court of West Virginia in the Spring of 1943, did not and does not change the law at all requiring the rate agreed upon in all judgments and decrees after maturity and judgment as well as before, as the Court will see by reading the opinion. However, if any interest is due it is according to § 28-2707 of the 1940 District Code.

The question of interest has long been a rather confusing matter. Interest was looked upon as anathema by both the clergy and the people for centuries, and not until the time of King Alfred, or William the Conqueror, about the Ninth or Tenth Century, was it regarded with any degree of favor, and finally accepted during the reign of Queen Elizabeth, as the result of statutes passed during the reign of Henry VIII.

“Interest upon the principal sum from the date of default, at a fair rate, is the appropriate measure of damages for delay in payment of a sum due.” (Royal Indemnity Co. v. U. S., 85 L. ed. 888.)

It was not only the rule of West Virginia to require judgments to bear interest at the rate agreed upon before and after judgment, as stated in *Morris v. Bear*, 72 W. Va., *Supra*, but the State of Virginia, the mother state, also enforced the same rule. (See *Brooks v. Roane*, 1 Call (Va.) 205; *Bent v. Patten*, 1 Rand (Va.) 25; *Marietta Bank v. Rindall*, 2 Rand (Va.) 465.) These cases are cited by the Supreme Court of West Virginia in *Morris v. Bear*, *Supra*.

In *Brownell v. City of St. Petersburg*, Circuit Court of Appeals, Fifth Circuit, June 2, 1942, the Court held,—

“* * * We do not agree with Appellant, however, that he was entitled to receive interest on the principal sum. By the agreement with the city, the funds were *not* to bear interest and it is quite plain that the city has had no beneficial use of the funds equivalent to the interest demanded. In such circumstances, in a suit based as this one is on equitable principles, a recovery of interest should not be had.”

The city of St. Petersburg had the use of the money by agreement, without interest, the same as the demand deposits in the instant case. The Court refused to allow interest on equitable principles, an excellent example to follow, it seems, in the pending case.

“The running of interest is suspended where payment is prevented by operation of law,” Vol. 7, p. 226, Enc. U. S. Sup. Ct. Reports 1910.

"As a general rule, after property of an insolvent passes into the hands of a receiver * * * interest is not allowed on the claims against the funds. The delay in distribution is the act of the law: it is a necessary incident to the settlement of the estate," (Thomas v. Western Car Co., 149 U. S. 95, 116, 37 L. ed. 663.)

"It would be manifestly unjust to exact interest as compensation, *or damages*, when the payment of the principal debt was interdicted," (Brown v. Hiatts, 15 Wall. 177, 185, 21 L. ed. 128).

"It does not appear reasonable that a decree which proceeds upon the idea that the injunction of the court was valid, ought to direct interest to be paid on the money which that injunction restrained the defendant from using," Osborn v. U. S., 9 Wheat. 738, 837, 6 L. ed. 204, (no interest was allowed).

"* * * but where a different rule has been established it governs in that locality, as the question," (interest), "is always one of local law," Holden v. Trust Co., 100 U. S. 72, 25 L. ed. 567.

"By the settled law of Iowa, as established by repeated decisions of her highest court, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards," Cromwell v. County of Sac, 96 U. S. 51, 61, 24 L. ed. 681. This is the same rule as in West Virginia and Virginia, and the District of Columbia since 1901.

"Where a receiver is appointed as a result of fraud and collusion, between the parties, the receivership should be set aside as far as it affects the interest of creditors or third persons." (A. & E. Enc. of Law, Vol. 23 (3d Ed.) p. 1132, citing numerous cases.)

(h) AM. CASES.—We have already shown by English cases that in England no interest was due under common law unless founded upon a *contract for interest*. We now wish to show, by the authorities, that the same situation existed in the United States and the District of Columbia, regarding interest, as existed in England. The liability for interest being in derogation of common law has to come from some source having authority, which for the District of Columbia is the Congress of the United States. The

National Bank Act, as already stated, has no application to a State Bank engaged in business in the District, except for examination, and administration in case of liquidation. The law of the District controls, as to interest, regardless of what the Supreme Court has announced regarding National Banks.

As late as 1893, Chief Justice Fuller, speaking for the Supreme Court, in the case of *Washington & Georgetown R. Co. v. Harmon*, 147 U. S. 290, said,—

“It is conceded that at common law, judgments whatever the cause of action, did not bear interest,” citing numerous cases.

“This was so in Maryland at the time of the cession of the District with, perhaps, some exceptions * * *.”

“To change the common law in the District, after the cession, of course *required the Act of Congress*.” Then followed a discussion of the Act of June 24, 1812, (D. C. Rev. Stat. §829), which declared “upon all judgments rendered on the common law side of the Circuit Court of said District in actions *founded on contracts*, interest at the rate of 6% per annum shall be awarded on the principal sum due until the judgment shall be satisfied.” * * * “By its terms this provision was confined exclusively to actions founded on contracts.”

The Court then proceeds to a discussion of the Act of Aug. 23d, 1842 (5 Stat. at L. 516, 518, Ch. 188), which provides for interest in all judgments in the Circuit or District Courts of the United States—

“* * * at the rate per annum as is allowed by law in judgments recovered in the Courts of such State.”

“This,” says the Court, “was carried forward into §966 of the Revised Statutes.” * * * “The purpose of this act was to bring about uniformity between tribunals of the United States and the States, upon the subject of interest, and the Supreme Court of the District of Columbia is neither within its terms nor its object. It is wholly inapplicable. Whatever the law of the District of Columbia is, upon the subject of interest, controls of course.”

Then the Court discusses the D. C. Act of April 22, 1870, which allows 6% on judgments or decrees,—

“but,” said the Court, “the Act does not say they shall bear interest in the future, if they did not in the past.”

“* * * judgments and decrees, as well as the loan or forbearance of money, goods, or things in action are referred to, but the Act does not say that they shall bear interest in the future if they did not in the past.

* * * On the contrary that which has been was to continue.” * * *

“There is nothing to indicate a legislative intention to declare that *all judgments* and decrees should thereafter bear interest by virtue of the statute, or to make any change in that respect. * * * Judgments bore interest in actions *founded on contracts* as provided by the Act of 1812.” (Italics supplied.)

In *Pierce v. U. S.*, 255 U. S. 704 (1921), Mr. Justice Brandeis said,—

“At common law judgments do not bear interest; interest rests solely upon statutory provisions,” citing a number of cases.

In *Gray v. District of Columbia*, 1 D. C. App. 20 (1893), our Court of Appeals quotes with approval the pronouncements of Chief Justice Fuller in *Washington & Georgetown R. Co. v. Harmon*, *Supra*. But opposing counsel and the lower Court insisted that interest is due on the demand deposits as damages or in the nature of damages, the amount being fixed according to the rate of interest prevailing in the State where the bank in liquidation is located. Opposing counsel will likely deluge this Court, as they did the lower Court, with Supreme Court cases regarding National Banks, but these cases do not apply to the District, as stated by Chief Justice Fuller. However, if this Court should follow these cases, then the law regarding interest in the District would prevail, which, by agreement, is nothing on demand deposits and 3% on Savings as already explained. Certainly the demand depositors had a constitutional right to agree with the Bank that they would not receive any interest. If they had agreed to receiving one or two percent, this Court would not question that agreement under §28-2707 of the D. C. Code, and having the right to agree to receive no interest, as they did by

agreement, relieves the Bank from any liability under §28-2701 of the Code. Unless we are correct in this, then the demand depositors would receive double the rate paid to savings, though the demand by agreement were not to receive any interest at all. To avoid such an unfair and unreasonable situation, the lower Court adopted the view of opposing counsel, regarding §28-2707, the effect of which was to ignore and disregard the plain provision that,—

“* * * the *judgment* for the plaintiff shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the contract, if any, until paid.”

We have not been able to find one single case in any of the reports of the D. C. Court of Appeals, *since* the enactment of the two sections of the Code referred to, where interest in excess of the amount agreed upon, was ever collected or allowed in any judgment. If opposing counsel can find any such case, we urge them to do so, for such a holding would mean the obliteration and utter disregard of the law. And we also invite and urge opposing counsel to produce a single D. C. case including interest in the judgment, when the agreement was to the effect that no interest would be received. The Bank in the instant case was simply a borrower, as any other corporation or individual. The same law applies. Had the Bank borrowed \$500,000 from the R. F. C. or from New York at 3% by contract, and defaulted in payment for six or twelve months, would this Court, in case of suit, entered judgment with 6% interest instead of 3% as urged by Appellee? Certainly not.

III.

Arbitrary refusal to liquidate.

The lower Court was in error in holding that the Bank was liable for interest during the eleven months of conservatorship, and for the same period when the Comptroller kept it in the hands of the conservator for the unlawful purpose of using it for the promotion of the Hamilton

National Bank; and also in error in holding the Bank liable for interest during the period which the Comptroller arbitrarily refused to convert the assets into cash and distribute the proceeds as required by law; and in error in holding the Bank liable for interest when the Comptroller had the cash in hand and arbitrarily refused to distribute it.

(a) CONSERVATORSHIP. Appellee admits that the Law Department of the Comptroller's office has interpreted *Richman v. Church*, 76 F. (2d) 344, to mean that no interest is due during the conservatorship, the Court holding—

“It is error to allow interest during the Conservatorship.”

But Appellee now insists to the contrary, claiming that such holding was on account of a special fund. But regardless of that decision, the cases appear to indicate that interest, if any, is due from the beginning of liquidation.

In *Bank v. Morganthau*, 66 App. D. C. 234, 238, 85 F. (2d) 811, involving this Bank, the Court said interest is due,

“since the date when the *receiver* took possession of it,”

which is binding upon the lower Court. In *American Surety Co. v. Beth. Nat'l Bank*, 86 L. ed. 231, 233, it was held that—

“* * * the claims must manifestly be estimated as of the same point of time * * * the declaration of insolvency,”

which would exclude the conservatorship period.

According to the text books, the rule appears to be,—

“Interest cannot be allowed on claims against an insolvent banking corporation between the making of an order pursuant to restraining the corporation from paying its deposits or any dividend thereon, and the appointment of a receiver.” (9 C. J. S. §527, p. 1011, Note 26.)

In the instant case, the bank was and is solvent and in involuntary liquidation, different from a voluntary liquida-

tion. We are, in this case, asking that the entire decree declaring the bank insolvent, be vacated and set aside,—not a part of the decree.

(b) REFUSAL TO ACT. All the cases hold that the purpose of a receivership is to enable the Comptroller to convert the assets into cash and make a prompt distribution in accordance with the Nat'l Bank Act of 1878, 12 U. S. C. A. §194. The records show, and it is admitted, that the bank was held in the hands of a conservator from March 14, 1933 to Feb. 10, 1934, or about eleven months, during all of which time the former Comptroller was doing everything in his power to prevent the opening of the bank, and using it to promote the Hamilton National Bank. See *Cooper v. Woodin*, 63 App. D. C. 311, 72 F. (2d) 179, and *Bank v. Morganthau*, 66 App. D. C. 234, 85 F. (2d) 811. If the former Comptroller honestly believed the bank insolvent, as he claimed, it was his sworn duty to liquidate it, which he refused to do, until he saw he could not use it. The Bank certainly should not be required to pay any interest at all for this period of eleven months, but, if any, only "since the Receiver took possession of it," as already held by this Court in *Bank v. Morganthau*, *Supra*.

(c) REFUSAL TO CONVERT. The records show that the Bank at all times had sufficient assets on hand, with which to pay all proven claims, had not the former Comptroller arbitrarily refused to convert the assets into cash as the law requires. That the Bank had sufficient liquid assets is beyond question. In the case of *Cooper v. Woodin*, April Term of this Court, 1934, No. 6202, p. 222, original, and 181 Print, of the record, of all of which this Court will please take judicial notice, Mr. Wm. M. Taylor, Bank Examiner, testified that he examined the Bank March 25, 1933, and then stated,—

"The report I testified to yesterday showed total 'acceptable' assets of \$1,915,346.22. They were the kind that would be good for any bank." * * * * * and besides that, the real estate loans which I said were slow would go into it, something like \$112,000, and

also any excess that may now exist in the increased market value of the bonds held by the Bank. * * * I do not remember just what amount of commercial loans I listed as 'slow', probably \$205,000. Speaking of the assets that are to go into the trust fund securing the 35% of deferred deposits, there is some value in the doubtful assets, (\$165,000) probably around 50%, and I would estimate that on the slow items (\$235,000) there might be from 10% to 20% loss."

What is the total result of these items?

"Good for any Bank"	\$1,915,346.22
Deduct 20% loss on "slow" loans leaves	188,000.00
Slow real estate loans	112,000.00
Doubtful 50% loss, as good	82,500.00
Increase in bonds	60,000.00

or a total of collectable assets of\$2,357,846.22

(d) REPORT OF SEPT. 30, 1934. The report of the receiver of Sept. 30, 1934 (App. 47) shows:

Proven claims for deposits of	\$1,512,387.79
good and collectable	2,357,846.22
according to Examiner Taylor's estimate, —no estimate given by the Receiver in his report of September 30, 1934. (App. p. 47.)	

Certainly there cannot be any question in the mind of the Court of the ability of the former Comptroller to borrow and pay promptly all proven claims, (\$1,512,387.79), or 100% instead of 65% with all these assets at the time of the first payment on June 28, 1934. This report of Sept. 30, 1934 shows a payment by the conservator of\$499,193.12, on account of preferred liability, and 88,595.67,

by the Receiver or a total preferred payment
of\$587,801.29.

Let us deduct this \$587,801.29 paid from the total good of \$2,357,846.22, which leaves us a balance of good assets of \$1,770,044.93. Is there any doubt in the mind of the Court of the ability of the former Comptroller to borrow, on the remaining assets, a sufficient amount to pay all proven claims, had he so desired? He had previously urged a sale

at face value of \$930,000 of the assets to the Hamilton National Bank (*Cooper v. Woodin, Supra*). He certainly could have sold and borrowed a sufficient amount to pay the \$1,512,387.79 proven, in full, even though the preferred of \$587,801.29 had to be deducted from Examiner Taylor's estimated good of \$2,357,846.22, for that would have left in excess of \$1,700,000.00, plus the \$400,000 estimated losses, most of which were paid.

But what did the former Comptroller do? This report says he received from the R. F. C.\$907,300.00, and that he repaid the R. F. C. 153,710.26. He paid 65%, but why not pay 75%? He had the cash on hand but refused to use it, as a face saving proposition. Why should the Bank or stockholders be made to pay interest for any of this period, assuming that the Bank was insolvent, which it was not, when the former Comptroller had sufficient assets but refused to convert them as the law requires? 6% interest on \$153,000 is in excess of \$18,000 for two years, and 6% on \$600,000 remaining after the 65% payment, for two years, is \$72,000. Is this what we call *Justice* in this Country?

(e) REPORT OF MARCH 31, 1935. The receiver's report of March 31, 1935, (App. 48), still shows only 65% paid or nothing paid for nine solid months following the first payment on June 28, 1934. Why was this? This report shows \$771,193.12 repaid to the R. F. C., and a balance of cash in hand of \$281,846.96. The money was borrowed for the purpose of paying dividends to depositors, but the Comptroller restores it to the lender. The proven claims, according to this report, were \$1,581,340.81. He had paid\$1,027,873.27, leaving a balance due of\$ 553,467.54. He had restored to the R. F. C.\$ 771,193.12, and had on hand, cash of\$ 281,846.96, or nearly double the amount needed to pay the balance of \$553,467.54, but as a face saving matter, or in order to wreck the bank and inflict damage, the former Comptroller

apparently deliberately and arbitrarily refused to disburse the cash after he had it in hand, but preferred to restore it to the R. F. C. We hope this Court will not countenance such misconduct as this. Is it or not simply the betrayal of a trust, the embezzlement of power regardless of the guilty party, high or low.

It is not denied that in April 23, 1934, the sum of \$1,080,000.00 was borrowed from the R. F. C., but was held and not distributed until June 28, 1934; that \$775,000.00 was borrowed from the R. F. C. on March 31, 1935, but was not distributed until Oct. 22, 1935, or for a period of approximately six months and twenty days, when only 15% was paid, when the 15% and all the balance proven could easily have been paid on March 31, 1935, the date of the borrowing of the \$775,000.00. Should the Bank be required to pay interest for such a fraud, or such gross negligence as to amount to fraud, as this? Mr. Justice Letts granted a motion to strike all charges in regard to this as immaterial and irrelevant—(For the borrowings from the R. F. C., see App. p. 49).

(f) REPORT OF MARCH 31, 1937. The reports are made quarterly. We do not have all of them, and if we did, it would require too much time and space to discuss them. Therefore, we are referring to only four or five typical examples. The report of March 31, 1937 (App. p. 48), shows 90% paid, with a balance of 10% unpaid, though the previous reports shows 100% of all proven claims could have been paid at the first payment of June 28, 1934, or long before the second payment on October 22, 1935.

(g) REPORT OF MARCH 31, 1938. The report of March 31, 1938, (App. 48), shows 100% paid on all proven claims, but does not give the date of the last payment, which was March 15, 1938, though the 100% could have been paid long before, as already shown.

(h) REPORT OF FEBRUARY 21, 1941. The report of Feb. 21, 1941, (App. 49), shows expenses had increased to \$217,815.18, or an increase from \$60,000 on Sept. 30, 1934

to over \$217,000 by Feb. 21, 1941, the expenses now being \$235,000 (App. 4), having grown from the sum of \$161,314.67, according to the report of March 31, 1938, to \$235,000 since the nuisance suit for interest was brought, and out of which this counterclaim grew, or an increase in alleged expenses of approximately \$75,000, since this useless nuisance suit was instituted.

We will show conclusively that this receivership could have been closed within 30 or 60 days following the payment of 100% March 15, 1938, with an additional expense of a few hundred dollars; that with this wasted \$75,000 deducted and with a proper credit for the time when all proven claims could have, and should have, been paid, or a proper deduction for the arbitrary delays in payment, it will be found that the Bank is due very little, if any, interest, especially if the D. C. law regarding interest which is controlling, is conformed to and not disregarded, as the lower Court did. We are not discussing the solvency of the Bank, but the ability to pay all proven claims.

IV.

Arbitrary acts.

In the beginning it was not our intention to go into the record in this case *in extenso*, but we decided to make a complete answer to every contention advanced by Appellee hoping to curtail our reply brief. We find we shall have to be very brief in our discussion of Arbitrary Acts and remaining points. In our substituted Counterclaim we set up a number of acts showing that the Savings Bank in the instant case was arbitrarily wrecked and destroyed, (App. 6, 7, 8). We hope this Court will read carefully these acts, all of which the lower Court, in error, held were immaterial, irrelevant and *res adjudicata*, though not a single, solitary act was pointed out as having ever before been passed upon by any Court, as that was impossible, for any statement to that effect would have been disproved by the record. Let us

first refer to the facts in interrogative form and then the law.

(1) **ARBITRARY ACTS.** Why did the former Comptroller insist upon \$150,000 cash or new money as a condition precedent to the reopening of this Bank, instead of permitting it to sell \$150,000 debenture notes, as he did in other banks to the extent of \$574,000,000, as shown by his own reports?

(2) Why did the former Comptroller refuse to permit this Bank to reopen by deferring 35% of its deposits, secured by slow but good assets, when at the same time he was permitting other banks to defer as much as 60% of their deposits according to his own records? This Bank offered to pay 65% cash instantly, but some of the others reopened and only paid 40%. Why this?

(3) Why did the former Comptroller refuse to allow this Bank to trustee its slow assets, with an agreement to pay 100% assessment by the stockholders, if necessary, to secure the 35% deferred, when at the same time he was allowing other banks to do this without objection?

(4) Why did the former Comptroller require this Bank to pay 6% interest on the deferred deposits, when at the same time, according to his records, he was permitting other banks to pay as low as 2%?

(5) Why did the former Comptroller order his attorney not to allow this bank to open under any circumstances, if he could prevent it?

(6) Why did the former Comptroller insist upon the institution of this nuisance assessment suit for \$100,000 when Carter B. Keene, his own receiver, informed him or his office that the Bank was perfectly solvent and refused to bring the suit, finally resigning, when Frederick J. Young, his successor brought the suit?

(7) Why did the former Comptroller refuse to obey the suggestion of his superior, the Secretary of the Treasury, to bring in a plan for the opening of the Bank? His own an-

swer was, because Appellant Cooper had charged him with fraud, (Cooper v. Woodin, *Supra*).

(8) Why did he so violently oppose the passage of Senate Bill 2308 which would have opened this and all other solvent banks? His letter of protest shows that he wanted the arbitrary power to do as he pleased, to be a law unto himself.

(9) Why did he say to one of his friends, (a responsible man), that he would open the bank, if his friend would purchase Appellant's stock and promise him never to resell it to Appellant?

(a) MATERIAL. All these charges are pertinent, material and relevant to this litigation and show conclusively, if proven, that the sole intent and purpose of the former Comptroller was to wreck and destroy the Bank in the instant case. Most of these acts are of record and all of them will be proven to the satisfaction of any jury.

V.

The decree in case No. 6605 should be vacated and set aside.

Appellant Cooper earnestly urges that the decree of this Court in Case No. 6605, October Term 1935, in Bank v. Morganthau, declaring the Bank insolvent be vacated and set aside, not only for the arbitrary acts already discussed, but also for the additional reason that the former Comptroller improperly and unlawfully injected matter into his brief and argument never mentioned in the pleadings, (App. 8).

(a) UNLAWFUL ITEMS. This included interest at 6% or \$162,000 accumulated since the arbitrary closing of the bank, contrary to the law and the contract, which was nothing on demand deposits and only 3% on savings deposits, as already shown; \$78,000 of accumulated costs, and \$167,000 of set offs which should have been eliminated as a charge against the Bank.

(b) LAW. The Law is very clear on this subject.

“Nor can such effect (*res adjudicata*) be given to a judgment where the court undertakes to decide a question not raised by the pleadings or submitted by the parties.” (34 C. J. 768.)

In *Prall v. Prall*, 56 App. D. C. 334, this Court overruled the lower court and vacated an order fifteen or twenty years subsequent to the filing of the original bill.

“A species of fraud frequently regarded as sufficient for equitable relief is misrepresentation.” (39 *Am. Jur.* 670.)

“The jurisdiction of Courts of Equity to reopen and set aside former decrees on the ground of accident, mistake and surprise is well recognized and frequently invoked * * *.” (*Dewey v. Stratton*, 114 F. 185 (5th Circuit).) See also 225 U. S. 444 (Mr. Justice Holmes); *King vs. West Virginia*, 216 U. S. 92, 100 and other cases cited in 225 U. S. 444, *Messenger vs. Anderson*. On page 30 Brief of the former Comptroller in No. 6605 supra, appears the statement that the first dividend of 65% and the second of 15% were “capacity” loans based upon a statute of Jan. 31, 1935 (Sec. 606a, Tit. 15 U. S. C.). These statements were not in the pleadings. The truth is, as we have already shown, that \$775,000 was borrowed from the R. F. C. on March 31, 1935 but was not distributed until Oct. 22, 1935. As was said by the Supreme Court in the old case of *Marbury vs. Madison* “you cannot sport away the rights of the citizen in this (arbitrary) manner.”

VI.

Refusal of depositors' petition.

The lower court was in error in refusing to grant permission of the depositors to file a petition urging a compromise or settlement of 3% to all (App. 2). This they regarded as wise and best, as it would give 3% of the demand depositors instead of nothing, according to their agreement, and it would prevent further waste and squandering of the assets and end a vexatious, doubtful and costly litigation. Certainly any depositor or interested party should have the right to intervene, in order to protect his

own interest, and prevent waste, even for the removal of the trustee or receiver where necessary, which we are glad to say is not true in the case of Receiver Persons, practically all the waste having occurred prior to his induction.

VII.

Impairment of Contractual Obligations.

The contracts or agreements with the depositors were specific and definite as to both demand and savings depositors, both of which are included in the two sections of the District Code to which we have already referred. The two sections are clear and positive as to their intent and are binding upon all our courts as they were enacted into law by the Congress of the United States. Any modification or enlargement of these contracts would clearly be in contravention of Clause 1, §10, Article 1 of the Constitution of the United States prohibiting the impairment of the obligation of contracts. Regardless of what the Supreme Court has done in National Bank cases, these two sections control in the instant case as ordained and enacted by Congress, defining the rights as to interest between defaulting debtors and creditors. Therefore, the lower court was clearly in error in violating the contracts as to both classes of depositors.

VIII.

The Due Process Clause.

The lower court was in error in undertaking to hear the case at all. Mr. Justice Letts had placed himself in an impossible situation in ordering a sale of the Bank Building over the protest of Appellant Cooper, when this litigation was pending, (App. 51) and no reasonable cause was shown for a sale of the Building which was bringing in returns approaching \$8500 per annum, all of which is now lost. The court was placed in the unfair position of having to disregard the law and the agreements and raise the rate to 6% in order to sustain its position in forcing a sale of

the Building, as the Comptroller already had on hand more than a sufficient amount of cash to pay all interest due, if any, which is denied, without a sale of the Building. After a sale of the Building, Mr. Justice Letts should have voluntarily stood aside, as practiced by members of the Supreme Court. This was a violation of the due process clause, as Appellant Cooper was denied a fair and impartial trial.

The Supreme Court is 100% correct about this, as is illustrated by the action of Mr. Justice Frankfurter in refusing to participate in a case where Appellant Cooper was interested, for the reason that Appellant Cooper had paid him a little tribute when his confirmation was before the Senate Judiciary Committee, simply saying,—

“* * * but if there be no constitutional or legal requirements regarding citizenship, then Dr. Frankfurter being otherwise qualified, could doubtless render us a great public service similar to that rendered the English people by William the Conqueror, for indeed our need is great. * * * Whatever else can be said, we are indebted to the city of Vienna or the Kingdom of Austria for sending us or lending us a 12 year old lad who has developed into one of the most learned men of the Nation, regarded as a great legal genius.”

This is a fine example by Mr. Justice Frankfurter for the judges of our lower courts to follow.

Conclusion.

While this case should be tried on its merits, we have endeavored to suggest two or three different methods of ending the litigation if this court can see its way clear to accept either suggestion, but if not, this case should be reversed and Appellant accorded a fair and impartial trial.

Respectfully submitted,

WADE H. COOPER, *Pro Se.*

WADE H. COOPER, *Attorney,*
University Club.

JOINT APPENDIX.

Case No. 8872.

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JOINT APPENDIX.**Case No. 8872.****From Amended Complaint Filed Jan. 23, 1939.**

1 3. The United States Savings Bank is a banking corporation organized under the laws of the State of West Virginia as the successor corporation in name, place, and stead of the North Savings Bank, incorporated under the laws of said State on the 16th of May, 1906. The certificate of incorporation and subsequent amendments thereto are appended to this complaint marked Exhibits "A. 1", "A. 2", "A. 3", and "A. 4" are made a part hereof.

From Exhibit "A. 1"**CERTIFICATE OF INCORPORATION****State of West Virginia****North Savings Bank**

* * * * *

3 II. The principal place of business of said corporation shall be located in the City of Washington, District of Columbia. Its chief works will be located in same place.

III. The objects and purposes for which this corporation is formed are as follows:

To do and carry on the business of general banking under the provisions of the laws of the State of West Virginia pertaining to the incorporation "of banks of issue or of discount and deposit", together with such powers and privileges as may be exercised under the laws of the United States for the territory of the District of Columbia, in so far as the same may not be inconsistent with or in violation of the laws of the State of West Virginia.

7 **Order Overruling Motion for Allowance
of Intervention.**

(Filed July 31st, 1941.)

This cause having come on for further consideration upon the motion of certain petitioners for leave to file an intervening petition, and it appearing to the satisfaction of the Court that the petition attached to said motion fails to show the existence of a class action, and requests relief that is beyond the authority of this Court, it is this 31st day of July, 1941

ORDERED, That the motion for the allowance of intervention in this cause be and said motion hereby is overruled.

/s/ T. ALAN GOLDSBOROUGH
Justice

97 **Order Overruling Motion for Hearing and Determination of Petition for Compromise.**

(Filed Feb. 8, 1944.)

Upon consideration of the motion of George B. Fraser and David B. Karrick filed herein February 2nd, 1944, by their attorneys Robert H. McNeill and S. Wallace Dempsey, and after oral argument in open court, it is by the court this 8th day of February, 1944,

ORDERED, that said motion for hearing and determination of the petition for compromise of all pending depositors claims be and it is hereby overruled.

F. DICKINSON LETTS
Justice

12 In this cause upon motion of the defendant, Wade H. Cooper, in open Court, it is ordered that he be allowed to withdraw his counterclaim filed March 1, 1944 and substitute for same the counterclaim this day exhibited

to the Court. All of which the Court doth order, adjudge and decree.

Dated: April 6th, 1944.

F. DICKINSON LETTS
Justice

**13 Substituted Counterclaim of Defendant
 Wade H. Cooper.**

(Filed April 6, 1944.)

By leave of the Court first had and obtained, defendant Wade H. Cooper withdraws his counterclaim filed March 1, 1944 and substitutes for same the following:

And now, as a counterclaim, defendant Wade H. Cooper says:

1. That the United States Savings Bank was organized and chartered under the laws of West Virginia in the year 1906 for the purpose of engaging in business in the District of Columbia; that said Bank did engage in business in the District of Columbia; that on February 10, 1934 the Comptroller of the Currency of the United States declared the said Bank insolvent and appointed a receiver for same, following the closing of this and all other banks by proclamation of the President of the United States of America on or about March 6, 1933, a conservator being in charge of the Bank from about March 14, 1933 to February 10, 1934.

2. That said Savings Bank was liquidated by said Comptroller or his receiver, and long ago paid 100 percent to all its creditors and depositors, same being the result of a payment of 65% June 28, 1934; 15% October 22, 1935; 10% July 25, 1936; and 10% March 15, 1938.

3. That said Savings Bank at the time of the appointment of a Receiver had a capital stock of \$100,000 divided into 1000 shares of \$100 each, defendant Cooper being the owner of 560 of said shares of stock; and as a result of careful management and denial of dividends

by the stockholders, said Bank had accumulated surplus and profits of around \$400,000 in order to protect its depositors.

- 14 4. That after payment of 100 percent to all its creditors and depositors and after an expenditure of approximately \$235,000, said Bank still has left in the hands of said Comptroller or his plaintiff receiver, the sum of approximately \$175,000, which is being withheld from defendant Cooper and other stockholders of said Bank upon the claim that it should be paid to the depositors of said Bank for interest, at the rate of 6% per annum.

5. That said Savings Bank accepted both savings and demand deposits; that by agreement with the savings depositors they were to receive 3% per annum on their accounts and by agreement with the demand depositors they were not to receive any interest at all on their accounts.

6. That the Charter of said Bank was subject to such changes and amendments of the laws of West Virginia, as from time to time might be enacted by the Legislature of said State; that the Legislature of the State of West Virginia, by an Act duly approved on February 28, 1929, expressly prohibited any Bank "organized and chartered" in said State from engaging "in business at any place other than its principal office in the State of West Virginia," and this defendant therefore says that the banking business conducted by the said United States Savings Bank in the District of Columbia from the date of the approval of said Act of the Legislature of said State, namely Feb. 28, 1929 to March 6, 1933, when said Bank was closed, was and is *ultra vires* said Corporation Bank, and that the said Bank and its stockholders, including defendant Cooper, were not and are not liable for, and the depositors are not entitled to, interest during the aforesaid period from February 28, 1929 to

March 6, 1933, and therefore, said sum of \$175,000 is lawfully due defendant Cooper and the other stockholders of said Bank.

7. That, if any interest whatever is due which is denied, it is according to contract or agreement as stated by the law enacted by Congress in 1901, Sec. 28-2707 of the D. C. Code 1940 (Title 17, Chap. 1, §7 of 1929 Code) which says:

15 "In an action in the District Court of the United States for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid. (Mar. 3, 1901, 31 Stat. 1378, ch. 854, §1184.)."

8. That no interest whatever is due by said Savings Bank for the period of eleven (11) months, namely, from about March 14, 1933 to February 10, 1934, while said Bank was in the care, custody and control of a conservator.

9. That no interest whatever is due by said Savings Bank for the period of eleven (11) months while the said Comptroller held the Bank in the hands of a conservator in order to use it for the promotion of the Hamilton National, as he did, instead of liquidating it, as the law requires, if he believed the Bank insolvent.

10. That said Savings Bank at all times had on hand a sufficient amount of cash or its equivalent in good negotiable or saleable assets, without liability, to enable it to pay all proven claims; that the said Comptroller or his receiver arbitrarily refused to convert these assets promptly into cash, and, therefore, said Savings Bank is not liable for interest for the refusal or failure to convert said assets into cash as aforesaid.

11. That the said Comptroller or his Receiver borrowed from the Reconstruction Finance Corp. at four different times, different sums of money as follows:

February	28, 1933—\$	75,000.00
April	23, 1934—	1,080,000.00
March	31, 1935—	775,000.00
March	31, 1936—	375,000.00

That said sum of \$1,080,000 was not disbursed until June 28, 1934; that said sum of \$775,000 was not disbursed until October 22, 1935, or a period of approximately six months and twenty days after the money was available, when only 15% was paid, leaving a balance in cash on hand of \$281,846.96, which should have been used for the payment of the unpaid balance of 20 percent.

16 12. That the former Comptroller, while requiring \$150,000.00 cash new money, as a condition precedent to the reopening of this Savings Bank, was at the same time approving the sale of preferred stock and debenture notes to the extent of \$574,000,000 by other banks which he permitted to reopen, according to his own reports.

13. That the former Comptroller, while refusing to permit this Savings Bank to defer or delay payment of 35% of its deposits well secured by so-called "unacceptable" paper, at the same time was allowing other banks to defer or delay payment as high as 60% in some cases.

14. That the former Comptroller systematically refused to allow a bank to trustee its assets when he wished to assess the stockholders, as in this case, but allowed a bank to trustee its assets when he did not wish to assess its stockholders, as in a number of instances in the City of Washington.

15. That the former Comptroller, while insisting upon payment of 6% by this Savings Bank upon de-

posits, in order to wreck it, was at the same time permitting other banks to pay much less, in some cases as low as 2%, in order to assist them as in the case of the South Carolina National Bank.

16. That the former Comptroller either ordered or agreed with his counsel, Geo. P. Barse, who was in charge of the matter, not to allow this Savings Bank to open under any circumstances, if he could prevent it.

17. That Carter B. Keene, first receiver of the said Bank, the alter ego of the former Comptroller, repeatedly stated that the said Bank was solvent, after an examination and in strong language refused to sue the stockholders, but he was "permitted" to resign and was succeeded by Frederick J. Young, who instituted this suit, Equity No. 65,140, to collect an assessment when the reports show that he had on hand in cash and other assets at the time, much more than was

needed to pay all proven claims including interest, if any was due, which is denied. Approximately \$65,000.00 has been dissipated and wasted since the institution of this suit as the records show.

18. That a large sum (about \$30,000) has been lost as the result of the receiver's gross negligence in failing to collect interest and pay taxes.

19. That when Senate Bill 2308, which would require the opening of this Bank, was introduced, the former Comptroller busied himself with writing long letters to the various members of the Senate Banking & Currency Committee in opposition to same, claiming the arbitrary right to open or close a bank himself, regardless of its solvency. He also caused Wayne Chatfield Taylor, Under Secretary of the Treasury, to write a similar letter to the Chairman of said Committee.

20. That the former Comptroller refused to follow the suggestion of his Superior, the Secretary of the Treasury, to bring in a plan to open the said Bank, on account of his animus toward this defendant Cooper, assigning as a reason that this defendant had charged him with "fraud and everything else," referring to previous litigation with him.

21. That the former Comptroller stated to a friend of his that he would reopen the said Bank, if his friend would purchase the stock of this defendant and agree never to resell it to this defendant.

22. That said Savings Bank was at all times solvent and has shown by the records of the Comptroller and his receiver that it was, in fact, four times solvent, after payment of 100 percent on the principal, having \$175,000 surplus left after payment of 100 percent and after an expenditure for alleged expenses of \$235,000.00.

23. That the said Savings Bank had been practically liquidated at the time this suit, Equity No. 65,140, was instituted; that whatever assets remained could easily have been converted into cash within thirty or sixty days at an expense of only a couple of thousand dollars.

18. 24. That the said former Comptroller in the hearing of case No. 6605 in the Court of Appeals, October Term, 1935, urged that the said Savings Bank was insolvent for the reason that it had to pay interest to its creditors and depositors at the rate of 6% or \$162,000, costs of \$78,000, unproven claims of \$124,000, none of which had ever been mentioned in the pleadings in said cause and therefore was improperly and unlawfully urged upon said Court of Appeals. The interest charge of 6% as urged was in direct violation of the contract rate (3% on savings), and on demand or checking deposits no interest at all by contract; and

also in direct violation of Sec. 28-2707 of the D. C. Code of 1940, which specifically provides that:

“* * * the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid;”

that all of said items were unlawfully injected into the brief and argument of the former Comptroller in said Court of Appeals pursuant to his clearly defined intent and purpose to wreck and destroy said Bank in order to inflict loss and injury upon this defendant, when he appointed the receiver on February 10, 1934.

25. That it is not clear, and defendant therefore charges, that the item of \$167,000.00 for which said Bank held off-sets, was not eliminated as a charge against said Bank which should have been done.

26. None of the foregoing acts or foregoing facts were ever passed upon by the courts in any previous litigation, as they were unknown to this defendant and could not have been known to him by the exercise of due diligence.

27. The following facts or acts were incorporated in previous litigation, either in *Cooper v. Woodin*, Equity No. 56,143, this Court, or in *Bank v. Morganthau*, Equity No. 57,344, this Court, of all of which this Court will take judicial notice:

- (a) That the former Comptroller arbitrarily refused to allow this defendant to negotiate with the depositors as required by the Conservation Act.
- (b) That the former Comptroller arbitrarily refused to approve a safe plan to pay the depositors of said Bank 100 per cent submitted by this defendant.
- (c) That the former Comptroller arbitrarily attempted to sell \$930,000.00 of the best assets of said

Savings Bank to the Hamilton National Bank, of his promotion, at 100 per cent face value.

- (d) That the former Comptroller, in violation of the law requiring an immediate distribution, caused the conservator of said Savings Bank to agree to liquidate, but not make a distribution until six months had passed.

This defendant is advised that this Court will take judicial notice of these and such other acts or facts as were presented in previous litigation in order to render complete justice.

WHEREFORE, this defendant Cooper, files this, his Counterclaim, and prays that the plaintiff be required to answer the same, but not under oath, and that the Court declare:

1. That said Savings Bank was solvent on February 10, 1934, and has been solvent ever since then;

2. That the decree or final order of the Court of Appeals in the case of *Bank v. Morgenthau, et al*, No. 6605, October Term 1935, declaring said Savings Bank insolvent, be vacated and set aside and that the decree of this Court based upon the mandate of said Court of Appeals, also be vacated and set aside;

3. That said Savings Bank was arbitrarily and fraudulently liquidated;

4. That all remaining assets be restored to the said Bank, its officers and directors or its stockholders;

5. That this Court take such action as is necessary to prevent further dissipation and wasting of the assets;

20 6. That plaintiff R. C. Parsons render an accounting showing the different amounts paid for counsel fees and to whom paid and for what services rendered; and the amounts paid and to whom and for what services, since the filing of this complaint; and what

amounts have been lost as the result of failure to pay taxes and collect interest;

7. That this Court declare the rights of all parties in the funds now in the hands of the Comptroller or his receiver, plaintiff in this case;

8. That this Court declare what rate of interest, if any, is due the creditors or depositors of said Savings Bank, or none, as the facts justify;

9. That Preston Delano, Comptroller of the Currency, Superior Officer of plaintiff, be made a party to this cause and required to answer, in order that justice may be done.

10. That the receivership be terminated and ended. Defendant demands a jury trial for all issues of fact. Defendant prays for general relief.

Dated: April 6, 1944.

WADE H. COOPER.

Wade H. Cooper, Attorney,
1135 Sixteenth St., N. W.
Copy Received.

Kremer and Bingham
By H. W. Bingham,
Apr. 6, 1944.

21 Motion to Strike Portions of Substituted Counter-claim of Defendant Wade H. Cooper.

(Filed April 11, 1944.)

R. C. Parsons, Receiver of the United States Savings Bank and plaintiff in the above entitled proceedings, moves to strike certain portions of the substituted counter-claim of Defendant Wade H. Cooper, filed herein April 6, 1944, as follows:

1. Plaintiff moves to strike the last three lines of paragraph No. 3 reading: "and as a result of careful manage-

ment and denial of dividends by the stockholders, said Bank had accumulated surplus and profits of around \$400,000 in order to protect its depositors." because said statement is so indefinite and uncertain as to time and facts that it can neither be admitted nor denied, and because it consists of argumentative conclusions immaterial to any of the issues of this case.

2. Plaintiff moves to strike all of paragraph No. 6 (except possibly lines 4 through 7½, which apparently purport to plead the West Virginia statute of February 28, 1929) because the first three lines regarding the Bank's charter being subject to amendments of the West Virginia law present solely a legal question, not a factual statement, and also because the remainder of said paragraph consists solely of defendant Cooper's interpretation of said
22 statute and his contentions as to its operation and effect, together with various argumentative legal conclusions, none of which is a proper subject of pleading. The statute, of course, speaks for itself and its construction is a matter of law for the court.

3. Plaintiff moves to strike all of paragraph No. 8 because it is primarily a legal conclusion, not a factual allegation, and while it may properly be considered as an item of relief to be requested in the prayer it has no place in the body of the counter-claim.

4. Plaintiff moves to strike all of paragraph No. 9 because it too consists solely of a legal conclusion lacking in factual allegations; furthermore, all contentions regarding the period of the conservatorship, particularly as regards the reason for its continuance and the promotion of the Hamilton National Bank, together with the acts of the Comptroller of the Currency in respect thereto, are all matters within the exclusive control and discretion of the Comptroller of the Currency and besides are matters which have become *res judicata* by reason of the decision of this

court and the Court of Appeals in the cases of *Cooper vs. Woodin*, (Equity No. 56143) 63 App. D. C. 311, 72 F (2d) 179, *United States Savings Bank vs. Morgenthau* (Equity No. 57344) 66 App. D. C. 234, 85 F (2d) 811 and *Cooper vs. O'Connor* (Law No. 88516) 69 App. D. C. 108, 99 F (2d) 143.

5. Plaintiff moves to strike all of paragraph No. 10 because it consists of unsupported argumentative conclusions as to the solvency of the Bank and the acts of the Comptroller regarding liquidation of the assets, all of which are matters exclusively within the jurisdiction and discretion of the Comptroller and obviously not material to any of the issues of this case.

6. Plaintiff moves to strike all of paragraph No. 23 11 because it consists of statements regarding the borrowing by the receivership from the R. F. C., which on their face are irrelevant and immaterial as to the ultimate question of the right of the depositors to receive interest on their claims and at what rate, and also because the questions sought to be raised as to liquidating the assets and obtaining cash for payment of dividends are manifestly matters for the exclusive determination and judgment of the Comptroller of the Currency, which certainly cannot be reviewed on the basis of argumentative and speculative conclusions as to what the Comptroller should have done with the receivership assets and the amounts borrowed from the R. F. C.

7. Plaintiff moves to strike all of paragraph No. 19 regarding the acts of the former Comptroller with reference to Senate Bill No. 2308 because the matter on its face is clearly and completely irrelevant, impertinent and immaterial as regards any of the issues in this case.

8. Plaintiff moves to strike all of paragraph No. 23 because it consists solely of argumentative, speculative and immaterial conclusions as to how the assets of the Bank should have been liquidated—matters within the exclusive discretion of the Comptroller.

9. Plaintiff moves to strike all of paragraph No. 24 because, on its face, it constitutes an improper collateral attack upon the outstanding decision of the Court of Appeals in the case of *United States Savings Bank vs. Morgenthau*, 66 App. D. C. 234, 85 F (2d) 811; because it contains unsupported and argumentative conclusions that said decision was obtained by improper and unlawful argument before the Court of Appeals; and because it is a matter of record in this court, of which the court will take judicial notice, that a similar attack on said decision

24 by defendant Cooper in the case of *McKinley High School Bank vs. Delano*, Civil Action No. 17348 in this court, was rejected by Mr. Justice Bailey in his opinion filed December 8, 1943 in said action and as a result thereof said matters and claims have become *res judicata* as to said defendant Cooper.

10. Plaintiff moves to strike all of paragraph No. 27 because defendant Cooper expressly admits therein that all allegations of said paragraph had previously been incorporated in either *Cooper vs. Woodin*, Equity No 56143, or *Bank vs. Morgenthau*, Equity No. 57344, in this court, and accordingly it follows that all said alleged facts and matters have become *res judicata* by reason of the decision in said cases.

KREMER and BINGHAM,
By H. DONALD KISTLER,
H. DONALD KISTLER,
921 Tower Building,
Attorneys for Plaintiff,
R. C. Parsons, Receiver.

Service of a copy of the foregoing Motion to Strike, together with the Points and Authorities attached thereto, is hereby acknowledged this 11th day of April, 1944.

WADE H. COOPER.

25 Order Striking Portions of Substituted Counterclaim of Defendant Wade H. Cooper.

(Filed April 21, 1944.)

Upon consideration of plaintiff's Motion to Strike Portions of Substituted Counterclaim of Defendant Wade H. Cooper, said motion having been filed therein April 11, 1944, it is, by the court, this 21st day of April, 1944

ORDERED that said motion be and it is hereby overruled as to part 3 thereof but sustained as to all other parts, and that, accordingly, the following designated portions of said substituted counterclaim be and they are hereby stricken:

1. The last three lines of paragraph No. 3 reading: "and as a result of careful management and denial of dividends by the stockholders, said Bank had accumulated surplus and profits of around \$400,000 in order to protect its depositors."

2. All of paragraph No. 6, except lines 4 through 7½ insofar as said lines purport to plead the West Virginia statute of February 28, 1929.

3. All of paragraphs Nos. 9, 10, 11, 19, 23, 24 and 27.

F. DICKINSON LETTS,
Justice.

Seen and objected to

WADE H. COOPER

4/21/44.

26 Plaintiff's Reply to Substituted Counterclaim of Defendant Wade H. Cooper.

(Filed April 28, 1944.)

Certain portions of the Substituted Counterclaim of Defendant Wade H. Cooper having been stricken by order of court entered herein April 21, 1944, plaintiff R. C. Parsons, Receiver of the United States Savings Bank, states

as follows by way of reply to the remaining portions of said substituted counterclaim:

1. Plaintiff admits the allegations of paragraph No. 1 of the substituted counterclaim, and states, by way of further answer thereto, that said bank conducted its sole banking business exclusively within the District of Columbia from the time of its incorporation until it was closed by said Presidential proclamation of March 6, 1933; and that, on or about February 28, 1933, just prior to said closing, the Board of Directors, of which defendant Cooper was a member, passed a resolution placing certain restrictions upon withdrawals by the depositors, a copy of which resolution is annexed hereto as Exhibit "A" and made a part hereof by this reference; and that, following the "banking holiday" as proclaimed by the President, the

Comptroller of the Currency refused to license this
27 bank to reopen under the provisions of the Bank Conservation Act (12 U.S.C.A. Sects. 201-213), but instead, on March 14, 1933, appointed a conservator thereunder; and said bank has never reopened for, nor engaged in, a banking business since it was closed on March 6, 1933.

2. Plaintiff admits the allegations of paragraph No. 2 of the substituted counterclaim, noting, however, by way of correction, that the payment of 100 per cent has been made only on proven claims, not to "all" creditors and depositors.

3. By way of reply to the first three and one quarter lines of paragraph No. 3 of the substituted counterclaim (the balance of said paragraph having been stricken), plaintiff admits that said bank, at the time of the receiver's appointment, had a capital stock of \$100,000.00 divided into 1,000 shares \$100.00 each and that defendant Cooper owned 560 shares thereof; and, for further answer thereto, plaintiff states that said capital structure and stock owner-

ship also existed when the bank was closed on March 6, 1933, and for many years prior thereto, including the full period from February 28, 1929, to March 6, 1933; that during said period defendant Cooper was a director and also the president and chief executive officer of said bank; and that during that same period the directors declared and paid dividends on the capital stock to the shareholders at the rate of 30 to 40 per cent per annum.

4. Plaintiff admits the factual allegations of paragraph No. 4 of the substituted counterclaim, subject, however, to the correction noted in paragraph 2 above.

5. Plaintiff admits the factual allegations of paragraph No. 5 of the substituted counterclaim, and states further that the complete agreement between the bank and the savings depositors as to interest was set forth in the pass books issued to said depositors, as appears, for example, from Saving Department Account Book. No. 46239, 28 attached hereto as Exhibit "B" and made a part hereof by this reference.

6. The court having stricken all of paragraph No. 6 of the substituted counterclaim, except lines four through seven and one-half insofar as said lines purport to plead the West Virginia statute of February 28, 1929, plaintiff, by way of answer thereto, admits that, on or about February 28, 1929, the legislature of West Virginia enacted a law entitled, and providing in part, as follows (Section 3131, West Virginia Code of 1932):

"Branch Banks Forbidden; Banks Not to Sign Indemnity Contract or Pledge Its Assets to Indemnify a Surety; Exception as to Guarantee of Federal Deposits and Deposits of State and Division Thereof.

" * * No banking institution chartered and authorized to engage in business under the laws of this state, shall hereafter install or maintain any branch bank, or engage in business at any place other than at its prin-*

cipal office in the State of West Virginia; or engage in any business other than authorized in this article. * * *

Plaintiff denies defendant Cooper's legal conclusion in said lines four through seven and one-half as to what is prohibited by this statute. By way of further answer, plaintiff refers to his allegations hereinabove in paragraph No. 3 of this Reply.

7. In answer to paragraph No. 7 of the substituted counterclaim, plaintiff admits the enactment and wording of Section 28-2707 of the 1940 D. C. Code, but denies the legal conclusions asserted by defendant Cooper with reference thereto. By way of further answer, plaintiff specifically pleads Section 28-2701 of the 1940 D. C. Code, which reads, in part, as follows:

“The rate of interest in the District upon the loan or forbearance of any money, goods, or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars
29 for one year, and at that rate for a greater or less sum or for a longer or shorter time; * * *

Plaintiff also pleads that provision of the National Bank Act (12 U. S. C. A. 194) requiring ratable distribution to depositors and reading in part as follows:

“From time to time, * * * the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, * * *

and also Section 26-101 of the 1940 D. C. Code (Sec. 298, Title 5, 1929 Code) extending the pertinent provisions of the National Bank Act and the jurisdiction of the Comptroller of the Currency to state incorporated banks located in the District of Columbia and reading in part as follows:

“* * * And the Comptroller shall have power, when in his opinion it is necessary, to take possession of any

such bank or company, for the reasons and in the manner and to the same extent as are provided in the laws of the United States with respect to national banks* * *

Plaintiff further states that the Comptroller of the Currency required the receiver of this bank to compute interest at the legal rate of 6% per annum on the unpaid balances of all claims of depositors from March 6, 1933, the date of closing, until March 15, 1938, the date of the last dividend payment (See paragraph 2 of the substituted counterclaim); that the computation of said interest results in a composite rate for the entire period of 12.549%; and that, as of the present time, said interest on the total claims proven amounts to the unpaid sum of approximately \$204,724.56.

8. Plaintiff denies the legal conclusion of paragraph No. 8 of the substituted counterclaim that no interest is due by the bank during the eleven months of the conservatorship, from March 14, 1933, to February 10, 1934, and states, instead, that the depositors are entitled to interest on their claims from the time the bank closed on March 6, 1933, until the payment of the final 10% of the principal amount
30 of said claims on March 15, 1938.

9, 10 & 11. Paragraphs 9, 10 and 11 of the substituted counterclaim having been stricken, no answer is required.

12, 13 & 14. Plaintiff has no knowledge of the allegations of paragraphs No. 12, 13 and 14 of the substituted counterclaim and therefore neither admits nor denies said allegations but demands strict proof thereof if they are in any way relevant and material.

15. In answer to paragraph No. 15 of the substituted counterclaim, plaintiff admits, as noted in paragraph 7 above, that the Comptroller required the receiver of this bank to compute interest at the rate of 6% per annum upon all unpaid deposits. Plaintiff further states that he is

without knowledge as to whether the former Comptroller permitted other banks to pay less than 6% interest, in some cases as low as 2%, and therefore neither admits nor denies said statement but demands strict proof thereof if in any way relevant and material. Furthermore plaintiff is advised and believes and therefore avers, as is disclosed by the annual reports of the Comptroller of the Currency to Congress, that interest in addition to 100% of principal has been paid on the claims of depositors after suspension in more than 400 bank receiverships under the National Bank Act, and that the following such interest payments computed on the basis of 6% per annum have been made by the Comptroller in the case of the following insolvent banks finally liquidated in the District of Columbia since the bank moratorium of March 6, 1933:

31	Bank	Total % of Interest Paid	Date Interest Paid	Law under which bank organized
	Chevy Chase Sav- ings Bank	8%	Nov. 1936	Arizona
	District National Bank	2.88%	Sep. 1942	Natl. Bank Act
	Northeast Savings Bank	5.16%	June 1940	Arizona
	Seventh Street Savings Bank..	6.8%	Apr. 1942	West Virginia
	Washington Sav- ings Bank	10.24%	Jan. 1939	Arizona

16. Plaintiff has no knowledge of the allegations of paragraph No. 16 of the substituted counterclaim and therefore neither admits nor denies said allegations but demands strict proof thereof if in any way relevant and material.

17. In answer to paragraph No. 17 of the substituted counterclaim, plaintiff admits that Carter B. Keene was the first receiver of the bank and that he subsequently resigned on December 31, 1936 (prior to the Comptroller's assessment of February 27, 1937) and was succeeded by Fred-

erick J. Young, who instituted Equity No. 65,140 to collect the assessment from the stockholders. Plaintiff has no knowledge of what, if anything, Carter B. Keene said with reference to the bank's solvency or as to suing the stockholders but demands strict proof thereof if in any way relevant and material. Plaintiff denies that the receiver's reports show that he had on hand sufficient cash and other assets to pay the depositors' claims, including interest, and states that said reports speak for themselves as to what is shown therein. Plaintiff also denies the conclusion that approximately \$65,000.00 has been dissipated and wasted since the institution of this suit, and states further that none of said allegations is relevant or material.

18. Plaintiff denies the allegations and conclusions of paragraph No. 18 of the substituted counterclaim, and states further that said assertions are not only unsupported by any factual allegations but are wholly irrelevant and immaterial.

32 19. Paragraph No. 19 of the substituted counterclaim having been stricken, no answer is required.

20 & 21. Plaintiff has no knowledge of the allegations of paragraphs No. 20 and 21, of the substituted counterclaim and therefore neither admits nor denies said allegations but demands strict proof thereof if in any way relevant and material.

22. In answer to paragraph No. 22 of the substituted counterclaim, plaintiff denies that said bank was at all times solvent or that the records of the Comptroller and his receiver show that it was four times solvent. Plaintiff admits that said bank has paid 100% on the principal amount of all proven claims and now has on hand approximately \$175,000.00; but states further, as noted in paragraph No. 7 hereinabove, that interest on said proven claims at the legal rate of 6% per annum amounts to approximately \$204,724.56, that, according to the receiver-

ship records, unproven claims remain unpaid in the principal amount of approximately \$45,264.19 with interest thereon in the amount of approximately \$5,680.20, and that there also remains unpaid the final expenses of the receivership. Plaintiff also admits that, since the closing of the bank on March 6, 1933, there has been an expenditure for expenses of liquidation of approximately \$235,000.00.

23 & 24. Paragraphs No. 23 and 24 of the substituted counterclaim having been stricken, no answer is required.

25. Plaintiff denies the allegations of paragraph No. 25 of the substituted counterclaim, and states further that said allegations are neither relevant nor material.

26. Plaintiff neither admits nor denies the allegations of paragraph No. 26 of the substituted counterclaim but demands strict proof thereof if in any way relevant and material.

33 27. Paragraph No. 27 of the substituted counterclaim having been stricken, no answer is required.

WHEREFORE, plaintiff prays that the court enter a judgment declaring the respective rights of the depositors and creditors and of the stockholders to the net remaining assets in the hands of the receiver and thereby determine all relevant and material questions and issues raised by the pleadings herein as to the right of the depositors and creditors to interest on their claims after suspension, and the rate and period of computation of such interest.

KREMER AND BINGHAM,
by H. Donald Kistler,
921 Tower Building,
Washington 5, D. C.,
*Attorneys for Plaintiff, R. C.
Parsons, Receiver.*

Copy received this 28th day of April, 1944.

WADE H. COOPER.

EXHIBIT "A".

34 SPECIAL MEETING BOARD OF DIRECTORS
 UNITED STATES SAVINGS BANK
 FEBRUARY 28, 1933, 12 OCLOCK NOON

Present:

MESSRS.

W. W. Anderson

Wm. T. Davis

Wm. D. Barry

Wm. R. deLashmutt

Wade H. Cooper

Chas. A. Goldsmith

Mr. Cooper presided.

Mr. deLashmutt reported that the bank was having considerable withdrawals from both checking and savings accounts, due to the financial situation in Washington, as well as the entire country.

The various methods of saving the situation were discussed; and finally, upon motion duly made and carried, the meeting recessed at 1:30 until 3:30 P. M. the same date.

The meeting of the Board of Directors again convened at 3:30 in the Board Room of the bank, Wade H. Cooper presiding.

The Chair appointed Wm. D. Barry, acting secretary, in the absence of Mr. deLashmutt.

The Chair reported that the withdrawals from the bank were continuing and after a thorough discussion of the situation, the following resolution, offered by Wm. T. Davis, seconded by Mr. Barry, was unanimously adopted.

WHEREAS, due to the disturbed banking situation in Washington, as well as throughout the country, it has had a tendency to excite and frighten the people, especially depositors in the different banks as well as the U. S. Savings Bank, therefore, be it

RESOLVED, by the Board of Directors of the U. S. Savings Bank, in special session assembled on this the 28th

day of February, 1933, that the officers of this bank be and they are hereby directed and instructed to require thirty days notice from savings depositors for the withdrawal of their monies on deposit; and that said officers are hereby directed and instructed to allow depositors having checking accounts to withdraw their monies only to the extent of five (5) per cent, once each month, until further notice.

There being no further business the meeting adjourned subject to call.

.....
Chairman

Wm. R. deLashmutt,
Acting Secretary.

EXHIBIT "B."

(OUTSIDE COVER)
SAVINGS DEPARTMENT
No. 46239

Lydia Beane
in Account with
United States Savings Bank
Washington, D. C.

Read Regulations within, to all of which you assent by accepting this book.
If you lose this book, give immediate notice to the Bank.
The book must be presented to withdraw money.
* * * * *

(INSIDE COVERS)

35

RULES AND REGULATIONS

Banking Hours

The Bank shall be open daily, except Sundays and legal holidays, from 9 A. M. to 5:30 P. M. On Saturdays the Bank shall be open from 9 A. M. to 12 M. and 6 P. M. to 8 P. M. The Board of Directors may change these hours without notice to depositors.

The Savings Department of the UNITED STATES SAVINGS BANK is organized to provide a safe and profitable place for the earnings of all persons in either small or large amounts.

REQUIREMENTS OF DEPOSITORS

Section 1. Deposits will be received and accounts opened on sums of one (\$1.00) dollar and upwards.

BY WHOM DEPOSITS MAY BE MADE

Section 2. (a) Individuals may deposit in their own right.

(b) Guardians may deposit for the benefit of their wards, and parents for their children.

(c) Trustees may deposit as such and they will not be required to specify the nature of their trust unless more than one account is opened by the same trustee.

RATE OF INTEREST

Section 3. (a) Interest will be allowed on all accounts having a credit of \$5.00 and upwards at the rate of 3 per cent per annum. No interest will be allowed when an account has not been continued with the bank for at least two calendar months prior to an interest period (i. e., January first and July first) nor on an account closed between interest periods.

WHEN INTEREST ALLOWED

(b) Interest will be allowed for every entire calendar month on the minimum balance computed from the first day of the month succeeding the deposit; if made, however, on or before 3 P. M. the fifth of the month, it will bear interest from the first, subject to Section 3, Paragraph a.

WHEN INTEREST COMPUTED

(c) Interest due depositors will be added to their principal on the books of the bank on the first days of January and July of each year, and such interest will be entered on depositors' pass books on the second Monday in the months named, and when not withdrawn will be entitled to earn interest as forming part of the principal.

Section 4. Pass books should be handed in on the first days of January and July of each year for the purpose of having said interest entered therein and written up and balanced.

RIGHT OF BANKS TO CLOSE OR DECLINE ACCOUNTS

Section 5. The Bank Officials reserve the right to close an account at any time by giving one calendar month's notice, interest to be calculated to the time of the expiration of such notice and no longer, or to the time the money is withdrawn. The Bank Officials also reserve the right to decline any application to open an account, if in their judgment it is wise and expedient.

Section 6. No money shall be paid except to the
36 person who has the legal right to the deposit, or on the depositor's order, which order must always be accompanied by the book. Ordinarily an order properly drawn and presented, together with the pass book, will be paid on demand, but the Bank reserves the right to require 30 days' notice in writing of the intention of the depositor to withdraw his or her deposits or any part thereof, but the failure of the Bank to require such notice shall in no way be deemed negligence or a perpetual waiver on the part of the Bank.

MINIMUM SUMS WITHDRAWN

Section 7. No sum shall be withdrawn less than one dollar, unless it be the whole amount remaining on deposit, or interest only.

LOST PASS BOOKS

Section 8. When a pass book is lost or destroyed the depositor must at once notify the Bank in writing. A new book will only be issued at the expiration of thirty days from the date of notice, and upon such other terms as the Bank may require.

RESPONSIBILITY FOR COLLECTIONS OF NOTES, DRAFTS AND CHECKS

Section 9. For the collection of all notes, drafts, checks, etc., outside of this city, the Bank will observe due diligence in its endeavor to select responsible agents, but will not be liable in case of their failure or negligence, or for loss of such items in the mails.

COMMERCIAL ACCOUNTS

Commercial deposits may be received in any amounts, which may be paid out on check of depositor without presentation of pass book. Such deposits shall not bear interest. The accounts of Commercial and Savings deposits shall be kept separately in the Bank.

SAVINGS DEPARTMENT OF UNITED STATES SAVINGS BANK WASHINGTON, D. C.

OFFICERS

Wade H. Cooper.....	President
Wm. D. Barry.....	Vice-President
Wilbur H. Zepp.....	Vice-President
Wm. R. DeLashmutt.....	V. P.-Cashier
John F. Cook.....	Asst. Cashier

39 **Motion of Defendant Wade H. Cooper for Summary Judgment.**

(Filed May 4, 1944.)

Defendant and counterclaimant, Wade H. Cooper, moves the Court under Rule 56 of the Federal Rules of Civil Procedure to enter summary judgment against the plaintiff receiver for the relief sought against said plaintiff in the substituted counterclaim filed herein for the reason that

the answer of said plaintiff fails to present any genuine issue as to any material fact in this litigation. In support of this motion, defendant says:

1. The following pertinent facts are admitted by the plaintiff in his answer to the counterclaim, or established by the pleadings in this cause:

(a) The Bank was organized and chartered in the State of West Virginia in 1906, with a capital stock of \$100,000. of 1000 shares of \$100. each, of which defendant Cooper was and is the owner of 560 of said shares;

(b) That the business of the Bank was conducted exclusively in the District of Columbia until closed by the President on March 6, 1933, followed by the appointment of a conservator on March 14, 1933, who remained in charge until the appointment of a receiver by the Comptroller of the Currency on February 10, 1934;

(c) The payment of 100 per cent in full to all proven claims of creditors and depositors within a composite or aggregate period of 13 months following the appointment of the receiver on February 10, 1934;

(d) That after an expenditure for alleged expenses of \$235,000. there remains in the hands of the plaintiff or the Comptroller the sum of \$175,000;

40 (e) That on February 28, 1929 the Legislature of the State of West Virginia enacted a law (Sec. 3131, W. Va. Code of 1932), prohibiting any bank "chartered and authorized to engage in business under the laws of this State" (W. Va.) from engaging "in business at *any place* other than its principal office in the State of West Virginia;"

(f) That said Savings Bank accepted both savings and demand deposits, and by agreement paid 3% on savings deposits and by agreement with demand depositors they were not to receive any interest at all;

(g) That the rate of interest in the District of Columbia is according to contract or agreement and in the absence of a contract, the rate is 6% ;

(h) That \$1,258,855.14 of the total liability of \$1,607,339.19 on March 6, 1933 was actually incurred subsequent to Feb. 14, 1929, (Affidavit of Frank A. Spicer).

WADE H. COOPER

WADE H. COOPER, *Attorney*
1135 Sixteenth St., N. W.

41 **Motion of Plaintiff for Summary Judgment.**

(Filed May 12th, 1944.)

Upon the basis of the allegations of the Substituted Counterclaim of defendant Wade H. Cooper and of the allegations of plaintiff's Reply to said counterclaim, together with the admitted facts and admissions which are of record in this litigation or of which the court will take judicial notice, and it appearing that said pleadings, together with the admissions and other established facts, fail to present a genuine issue as to any material fact but only questions of law to be determined by the court, plaintiff moves the court under Rule 56 of the Federal Rules of Civil Procedure to enter summary judgment declaring the rights of the respective parties herein as follows:

1. The United States Savings Bank having been chartered in West Virginia to do its banking business in the District of Columbia, the conduct of said business exclusively in the District of Columbia thereafter until the date of closing, March 6, 1933, was neither *ultra vires* under the West Virginia statute of February 28, 1929, prohibiting the maintenance of branch banks by banking institutions chartered and authorized to engage in business under the laws of that State, nor was it a violation thereof. Furthermore,

42 this question cannot be raised collaterally, but only directly by the state in a proper proceeding; and, in any event, defendant Cooper, as an officer, director and stockholder of said bank during and after 1929 and, as such, having held the bank out to the public and to the Comptroller of the Currency as an existing corporate entity, is estopped to deny the validity of the bank's existence and its business from which he necessarily and admittedly benefitted during that time. (Thus see plaintiff's affidavit attached hereto as Exhibit I, disclosing the declaration and payment of dividends to the stockholders after 1929, and the bank's sworn Reports of Condition, dated September 30, 1932 and December 31, 1932, attached hereto as Exhibits IIa and IIb and disclosing various incidents of purported corporate existence.)

2. When the United States Savings Bank, a West Virginia Corporation, came into the District of Columbia to conduct its banking business, it did so subject to all applicable laws of the District, particularly Section 713 of the 1901 Code (Sec. 26-101, 1940 D. C. Code) and thereby submitted itself to the supervision and control, both in operation and insolvency, of the Comptroller of the Currency to the same extent as if it were a national bank.

3. It is established law under the National Bank Act (and also under the law of West Virginia) that, if the assets of an insolvent bank prove more than sufficient, upon final liquidation thereof, to pay the principal amount of all claims, then all depositors are entitled to interest on their claims from the date of suspension as compensation or damages for the default in the payment of said claims and said interest must be paid in full before any remaining assets may be turned over to the stockholders.

43 4. The rate of interest to which the depositors are entitled is the legal or statutory rate of the jurisdiction in which the liquidation of the bank is conducted—in this case the District of Columbia, where, under Section

1178 of the 1901 Code (Sec. 28-2701, 1940 D. C. Code), said rate is 6% per annum in the absence of express contract or agreement to the contrary.

5. The contract between the depositors and the bank as to the payment of interest (Exhibit "B" to plaintiff's Reply) specifies certain conditions which on their face contemplate the existence of only a solvent and going banking concern, and there is no provision nor agreement therein, express or implied, as to the payment of interest or the rate thereof in the event of default or forbearance by the bank resulting from any cause including insolvency, and, therefore, under the applicable District of Columbia law as to the rate of interest upon the forbearance of money, the rate of such interest after the bank's closing must be the statutory or legal rate of 6% per annum, and, under the mandatory provisions of the National Bank Act requiring ratable distribution, said interest of 6% is necessarily payable to all depositors alike whether their deposits were time or demand prior to suspension.

6. Since the bank never reopened for business after it was closed by the President's Proclamation of March 6, 1933, (a conservator having been appointed on March 14, 1933, and a receiver approximately eleven months thereafter on February 10, 1934), the rights of the depositors, including the right to interest on their claims, became fixed at the latest as of said date of closing; furthermore, under the provisions of the Bank Conservation Act, the rights of all parties, with certain exceptions not here material, were the same as if a receiver had been appointed, and, accordingly, the interest to which the depositors are entitled must be computed for the entire period from said date of closing to the payment of their claims, including the eleven months of the conservatorship.

7. In all cases where the assets of insolvent banks being liquidated by the Comptroller of the Currency have proved sufficient to pay any interest in addition to prin-

cipal, the right of all depositors to receive interest on their claims after suspension at the full legal or statutory rate is controlled by statute and judicial interpretation of long standing, and the rule has been so uniformly followed without exception that no custom nor usage to the contrary can be found, and alleged equitable considerations purportedly justifying a lesser rate have either been rejected by the courts because of the established law or are founded on cases clearly and completely distinguishable.

8. The determination of insolvency, the appointment of a receiver, and the liquidation of the assets are matters exclusively within the jurisdiction and discretion of the Comptroller of the Currency, which cannot be reviewed except for actual fraud, and defendant Cooper's assertions regarding the wrongful closing of the bank and the allegedly fraudulent acts of the former Comptroller are not only wholly lacking in factual allegations showing fraud or arbitrary abuse of discretion, but consist solely of argumentative, speculative and unsupported conclusions which raise no issue as to any material fact. Furthermore it has already been judicially determined as against defendant Cooper in the cases of *Cooper v. Woodin*, 63 App. D. C. 311, 72 F(2d) 179, *United States Savings Bank v. Morgenthau*, 66 App. D. C. 234, 85 F(2d) 811, and *Cooper* 45 *v. O'Connor*, 69 App. D. C. 108, 99 F(2d) 143, of which this court will take judicial notice, that the closing of this bank, the appointment of a receiver and the various related acts of the Comptroller attacked by said Cooper in those cases constituted a proper exercise of the Comptroller's authority and discretion, and accordingly the matters determined in said cases are *res judicata* and cannot now be reasserted in this action.

9. Defendant Cooper's assertions and comparisons regarding the alleged methods, acts and policies of the former Comptroller of the Currency in handling various other banks subject to his jurisdiction are not only completely

immaterial as regards the issues of this case but are at best mere conclusions unsupported by any proper factual showing and obviously involve matters exclusively within the Comptroller's discretion, and accordingly said allegations are wholly irrelevant and fail to raise an issue as to any material fact.

10. The ultimate question in this litigation involves the ownership, as between the depositors and the stockholders, of the net remaining assets in the hands of the receiver, and, it being established law that the depositors are entitled to interest on their claims after suspension so that no part of the assets may be turned over by the receiver to the stockholders until after both the principal of the debts and the interest thereon are fully paid, it follows that the unsupported claims and conclusions of the majority stockholder, defendant Cooper, regarding the Comptroller's and receiver's alleged dissipation and wasting of assets, together with their alleged improper acts of liquidation and wrongful or negligent procedures and decisions in connection therewith, can have no bearing whatsoever as a matter of law on the real issues of this case.

46 11. In any event, all of the above noted allegations, conclusions, assertions and contentions of defendant Cooper with reference to the solvency and wrongful closing of the bank and the other allegedly fraudulent and improper acts of the Comptroller of the Currency, particularly those specified in paragraphs 12, 13, 14, 15, 16, 17, 18, 20, 22, and elsewhere in his substituted counterclaim, have all previously been asserted by said defendant in his Cross-Complaint in the case of *McKinley High School Bank et al. v. Delano, et al.*, Civil Action No. 17348 in this court, and adjudicated against him by reason of the final dismissal of said Cross-Complaint by order of Mr. Justice Bailey entered therein January 7, 1944, pursuant to his opinion and ruling filed December 8, 1943, and, accordingly, all of said matters including those which defendant

Cooper claims were not determined in *Cooper v. Woodin, supra*, *United States Savings Bank v. Morgenthau, supra*, and *Cooper v. O'Connor, supra*, have now clearly become *res judicata*, and cannot here be reviewed.

KREMER AND BINGHAM

By H. Donald Kistler,

921 Tower Building

Washington 5, D. C.

Attorneys for Plaintiff

R. C. Parsons, Receiver

Service of a copy of the foregoing
Motion for Summary Judgment, with Exhibits
and Points and Authorities attached, is hereby
acknowledged this 11th day of May, 1944.

WADE H. COOPER

47

Exhibit I.

AFFIDAVIT OF PLAINTIFF, R. C. PARSONS, RECEIVER.

(District of Columbia) ss:

R. C. Parsons, being first duly sworn, on oath deposes and says:

1. That he is the duly appointed, qualified and acting receiver of the United States Savings Bank, having been appointed by the Comptroller of the Currency on July 18, 1942; and that, as such Receiver, he has possession of all the books, records and assets of every description of said bank, and is the plaintiff in the above entitled action wherein defendant Cooper has filed a substituted counterclaim naming plaintiff as the counter-defendant.

2. That said books and records, specifically the minute books covering the meetings of the Board of Directors for the period from 1929 to 1933, and the "Dividends Paid"

account in the general ledger, disclose that the following dividends were declared and paid by the bank during the entire period from 1929 to 1933:

Dividend No.	Date of Resolution of Bd. of Dirs.	Transferred to "Dividends Paid" Account on General Ledger		
		Date	Amount	Percentage
63	3-13-29	3-30-29	\$ 7,500.00	7½%
64	6-12-29	6-29-29	7,500.00	7½%
Sp.-7	6-12-29	6-29-29	5,000.00	5%
65	9-11-29	10- 2-29	7,500.00	7½%
66	12-11-29	12-30-29	7,500.00	7½%
Sp.-8	12-11-29	12-30-29	5,000.00	5%
Total, 1929			\$40,000.00	40%
48				
67	3-12-30	4- 1-30	\$ 7,500.00	7½%
68	6-11-30	6-28-30	7,500.00	7½%
69	9-10-30	10- 2-30	7,500.00	7½%
70	12-10-30	12-27-30	7,500.00	7½%
Total, 1930			\$30,000.00	30%
71		3-26-31	\$ 7,500.00	7½%
72		6-27-31	7,500.00	7½%
73		10- 1-31	7,500.00	7½%
74		12-30-31	7,500.00	7½%
Total, 1931			\$30,000.00	30%
75	3- 9-32	3-31-32	\$ 7,500.00	7½%
76	6- 8-32	6-28-32	7,500.00	7½%
77	9-14-32	9-28-32	7,500.00	7½%
78	12-14-32	12-30-32	4,000.00	4%
Total, 1932			\$26,500.00	26½%

3. That the attached photostatic copies of the minutes of two of the meetings of the Board of Directors of the bank, to-wit, the meetings of December 11, 1929 and December 14, 1932, at which the dividend resolutions of the same dates were passed, both meetings having been presided over by defendant Wade H. Cooper and the minutes signed by him, are true and accurate copies of the original minutes of said meetings in the possession of affiant.

4. That the Examiner's Report of The Condition of the United States Savings Bank filed with the Comptroller of the Currency and disclosing the result of the examination of the bank conducted during the period from October 11, 1932 through October 17, 1932, has been personally examined by affiant, and, on Page 11 thereof, under the heading "Recapitulation—Losses, Etc." is to be found the following valuation as to estimated slow, doubtful and bad assets:

RECAPITULATION — LOSSES, ETC.

Resources	Slow	Doubtful (loss probable but not Estimated)	Estimated Losses	Estimated Value of Assets Not Shown on Books
All loans and dis- counts	\$297 457 68	114 814 28	20 788 55	
Overdrafts			15 98	
Premium on U. S. Bonds				
Bonds, securities, etc., Defaulted..			39 321 88	
Banking house .				
Furniture and fixtures				
Other real estate	10 000 00			
Cash Items			60 50	
Shortages, Cash.			853 13	
Judgments				
Unpaid Bills ...				
Accrued interest.			12 000 00	
Saving Accounts				
TOTAL	307 457 68	114 814 28	73 040 04	

R. C. PARSONS,
*R. C. Parsons, Receiver of the
United States Savings Bank.*

Subscribed and sworn to before me
this 11th day of May, 1944.

J. F. Douglas,
(Seal) Notary Public, D. C.

My commission expires November 30, 1948.

50 MEETING BOARD OF DIRECTORS
 DECEMBER 11, 1929, 8 P. M.

Present: Messrs.:

W. W. Anderson	Wm. T. Davis
Wm. D. Barry	Wm. R. deLashmutt
Oscar Baum	Chas. A. Goldsmith
Wade H. Cooper	W. E. G. Penny
Wilbur H. Zepp	

* * * * *

New Business:

On motion by Mr. Davis, seconded by Mr. Baum and duly carried, the regular dividend of 7½% and a special dividend of 5% was declared, payable December 31st to stockholders of record December 20, 1929.

* * * * *

51 Wm. R. deLashmutt	WADE H. COOPER
<i>Secretary.</i>	<i>Chairman</i>

—

52 MEETING OF THE BOARD OF DIRECTORS
 UNITED STATES SAVINGS BANK
 DECEMBER 14, 1932, 8 P. M.

Present: Messrs.

Wm. D. Barry	Wm. R. deLashmutt
Wade H. Cooper	Chas. A. Goldsmith
Wm. T. Davis	Wilbur H. Zepp

Mr. Cooper presided.

* * * * *

New Business:

On motion of Mr. Davis, seconded by Mr. Zepp, and duly carried, a quarterly dividend of 4% was declared, payable December 31st to stockholders of record December 20, 1932.

* * * * *

WADE H. COOPER,
Chairman.

53 Wm. R. deLashmutt
<i>Secretary.</i>

56 FROM REPORT OF CONDITION OF THE
UNITED STATES SAVINGS BANK,
SEPT. 30, 1932
(Exhibit IIa).

The "Report of Condition of the United States Savings Bank of Washington, D. C. at the close of business on September 30, 1932," filed with the Comptroller of the Currency pursuant to law, a copy of which is contained in the photostatic record on file with the clerk, was signed and sworn to by William R. de Lashmutt, as cashier and attested by seven persons, including Wade H. Cooper, as "Directors."

Under the heading "Liabilities" the following entries appear:

Capital stock paid in	\$100,000.00
Surplus	150,000.00
Undivided profits—net	70,720.42
Reserves for contingencies	23,012.60

Schedule A, on page 2 of the Report contains the following entries under the heading "Names of Officers and Directors; * * *and Shares Owned":

Names of Officers and Directors	Official Title	Number of shares of stock of this bank owned
Wade H. Cooper	Pres.	560
Wm. D. Barry	Vice-Pres.	77
Wilbur H. Zepp	Vice-Pres.	20
Wm. R. de Lashmutt	V.P. and cashier	50
John F. Cook	Asst. Cashier .	20
W. W. Anderson		13
Oscar Baum		5
Wm. T. Davis		32
Charles A. Goldsmith		42

The record (R. 60) contains a photostatic copy of a similar report dated December 31, 1932 (Exhibit IIb) containing similar entries, sworn to by the bank's cashier and attested, as required, by certain "Directors" including Wade H. Cooper.

Memorandum.

(Filed June 15th, 1944.)

There is before the court the motion of plaintiff for summary judgment and that of defendant Wade H. Cooper for like relief. These motions relate only to the issues raised by defendant Cooper in his substituted counterclaim.

The material facts are not in dispute. The United States Savings Bank, a West Virginia corporation organized in 1906 for the purpose of engaging in a banking business in the District of Columbia, conducted its business exclusively in the District from the time of its organization until it was closed by the President's Proclamation of March 6, 1933. Defendant Wade H. Cooper was the owner of 56% of its capital stock and for many years was its president and chief executive officer.

By unanimous resolution of the Board of Directors at a meeting presided over by defendant Cooper on February 28, 1933, withdrawal of deposits payable on demand were restricted. Thereafter the bank was closed by the Proclamation of March 6, 1933, a conservator was appointed by the Comptroller of the Currency on March 14, 1933, under 12 U. S. C. A. 203, and a receiver on February 10, 1934, under 12 U. S. C. A. 191-2, the Comptroller in each instance acting pursuant to the provisions of Title 5, §298 of the 1929 D. C. Code (§26-101 of the 1940 D. C. Code).

65 It is disclosed by the books and records of the bank that during the four years immediately preceding the closing of the bank in 1933 the following annual dividend distributions were declared and paid quarterly to the stockholders: 40% in 1929; 30% in 1930; 30% in 1931; and 26½% in 1932.

At the time of the resolution of February 28, 1933, and of the closing of the bank on March 6, 1933, 3% interest was being paid on savings deposits and no interest on commercial or checking deposits.

Since the appointment of the receiver, dividends totaling 100% of the principal amount of the depositor and creditor claims have been paid as follows: 65% June 28, 1934; 15% October 22, 1935; 10% July 25, 1936; and 10% March 15, 1938. Claims totaling \$45,264.19, which existed against the bank at suspension, remain unproved against the receiver, but may be proved at any time prior to the closing of the receivership. The sum of \$204,724.56 (plus \$5,680.20 on said unproven claims) is necessary to pay the full interest dividend of 6% claimed by the plaintiff receiver to be due and owing to the depositors and creditors; and, to meet said claim, the receivership has on hand, as proceeds of the assets and collections on the stock assessment, only about \$178,000.00 from which certain remaining administrative expenses must first be paid.

Defendant Cooper asks the court to find that the bank was solvent when closed: he asks that the decision of the Court of Appeals in *United States Savings Bank vs. Morgenthau*, 66 App. D. C. 234, be vacated and set aside and that the judgment of this court entered upon the mandate of the Court of Appeals be vacated; he asks the court
 66 to find that the bank was arbitrarily and fraudulently liquidated; he asks that the remaining assets in the hands of the receiver be restored to the stockholders; he asks the court to prevent further dissipation and waste of the assets; he asks that the receiver be required to render an accounting; he asks the court to declare what rate of interest, if any, is due the creditors or the depositors.

To summarize the demands of defendant Cooper in his substituted counterclaim he asks the court to direct the distribution of the assets now in the hands of the receiver. It is his contention that the remaining assets, in whole or in major part, should be paid over to the stockholders and so deprive the depositors of interest on their claims.

The court finds that the substituted counterclaim of defendant Cooper is without merit. It will not be necessary

to analyze in detail the various contentions which have been presented by the substituted counterclaim. In the argument, oral and written, the emphasis has been placed upon the following contentions. Defendant Cooper maintains that the business of the bank after February 28, 1929 was *ultra vires* and that the depositors and creditors should be denied interest from such date; he says that if any interest is allowable it should be limited to the contract rate, viz. 3% on time deposits and no interest on commercial or demand deposits; he says that no interest should in any event be paid for the period of the conservatorship.

In support of his contention that the business of the bank was *ultra vires* defendant Cooper cites §3131, 1932 W. Va. Code (act of February 28, 1929) which provides as follows:

67 "No banking institution chartered and authorized to engage in business under the laws of this state, shall hereafter install or maintain any branch bank, or engage in business at any place other than at its principal office in the State of West Virginia; or engage in any business other than authorized in this article."

The statute quoted does not apply to a bank such as the United States Savings Bank, legally incorporated in West Virginia for the express purpose of conducting its banking business solely in the District of Columbia. The United States Savings Bank was not engaged "in business under the laws" of West Virginia. The bank was not subject to the supervision of the West Virginia Commissioner of Banking and was not required to make the usual reports required by West Virginia law. This seems clear from the West Virginia enactment of February 24, 1937, §3224, 1937 W. Va. Code. The business of the bank conducted in the District of Columbia was subject to the supervision of the Comptroller of the Currency under the National Bank Act.

The contention that the business of the bank was *ultra vires* may not be raised collaterally but may be raised only by the State of West Virginia in a proper proceeding. Bank

of Tupelo, Miss. v. Stonum, 281 S. W. 110. See also 50 A. L. R. 1359. America Surety Company of New York vs. Moran, 64 App. D. C. 127; Thompson vs. Park Savings Bank, 64 App. D. C. 308.

Defendant Cooper, a stockholder, director, and officer of the bank during and after 1929 may not be heard to say that the bank exceeded its corporate powers in continuing to transact its banking business. He is estopped to deny the corporate existence of the bank or the validity of its transactions. Benefits have inured to him during the
68 entire period in question; as is evidenced by his receipt of dividends upon his stock for the years 1929, 1930, 1931 and 1932. To permit defendant Cooper to deny the validity of the bank's transactions would be to prefer him as a stockholder and officer over depositors whose deposits were invited by defendant Cooper and those associated with him in the management of the bank. See Casey vs. Galli, 94 U. S. 673; American Surety Company of New York vs. Moran, *supra*; Thompson vs. Park Savings Bank, *supra*; Deitrick vs. Greeney, 309 U. S. 190.

When assets of an insolvent bank being liquidated under the Comptroller of the Currency are sufficient to pay more than 100% of the principal amount of depositors' claims said depositors are entitled to interest on their claims from the date of suspension until paid, computed at the statutory or legal rate of the jurisdiction in which the liquidation is had. Elliott vs. First Inland National Bank of Pendleton, 32 F. Supp. 839; Richmond vs. Irons, 121 U. S. 27. Interest on time and savings deposits should be computed to the date of closing at the contract rate. Cronkleton vs. Ebmeier, 38 F. 2d 748; American National Bank of Arkansas City, Kansas vs. Williams, 101 F. 943. After the date of closing deposits whether savings or demand should bear interest at the local statutory rate on judgments. Cronkleton vs. Ebmeier, *supra*; Elliott vs. First Inland National Bank of Pendleton, *supra*.

In *Richmond vs. Irons, supra*, the Supreme Court held that the act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amounts

then due as against the shareholders to the time of
69 payment. The weight of authority is that interest is due and payable for the period of conservatorship.

See *Stein vs. Delano*, 121 F. 2d 975. In *Ticonic National Bank vs. Sprague*, 303 U. S. 406, the court said that as an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand. That interest after suspension is paid as damages or as compensation for the withholding of money due has ample support in the authorities. The recent case of *Federal Deposit Insurance Corporation vs. Falk*, 14 N. W. 203 (decided by the Supreme Court of Wisconsin on April 14, 1944) is directly in point and reflects the prevailing view as gathered from the reported cases. See also *Bates vs. Farmers Savings Bank*, 231 Iowa 1151.

That the depositors of the United States Savings Bank are entitled to interest is *res judicata*. In *United States Savings Bank vs. Morgenthau, supra*, the court said "it is plain that no part of the assets of the bank may be turned over by the receiver to the stockholders until after both the principal of the debt and the interest thereon are fully paid."

Defendant Cooper advances the argument that the law of West Virginia is controlling and that under such law no interest is allowable to depositors. The court thinks such position is untenable in view of the announcement in *United States Savings Bank vs. Morgenthau, supra*. It seems clear that the bank is being liquidated under the laws of the District of Columbia (§26-101 of the 1940 D. C. Code), and the applicable provisions of the National Bank Act. In *Hoffman vs. Unger*, a West Virginia case, 24 S. E. 2d 911,

after 100% had been paid to depositors, the court awarded the remaining surplus to depositors as interest on their claims, in opposition to the demands of the stock-
 70 holders. The court in that case relied on *Richmond vs. Irons, supra*, and *Stein vs. Delano, supra*. The court held that interest after suspension forms a part of the obligations of the bank.

It is the contention of defendant Cooper that if any interest is payable it must be limited at most to savings account depositors at the rate of 3% per annum with no interest for commercial depositors. In support of this proposition he relies on §28-2707 of the 1940 D. C. Code, providing that a judgment in the District Court for a liquidated debt on which interest is payable by contract or by law or usage, "shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid." This position is manifestly unsound. It disregards §28-2701 of the 1940 D. C. Code which fixes the statutory or legal rate of interest upon the loan or forbearance of money at 6% per annum, in the absence of "express contract as to such rate." The proposition is made in disregard of the fact that suspension obviates the necessity for demand and that the debt became fixed and due as of the date of suspension and that no contract purports to fix the rate of interest as damages for withholding the deposits after they became due by reason of the suspension of the bank's business. For the default or forbearance in the payment of depositors' claims interest is awarded as damages and the rate is fixed by §28-2701 of the 1940 D. C. Code. Clearly the suspension of the bank in 1933 constituted an actual and unqualified "forbearance of the claims of all depositors." See *Richards vs. Bippus*, 18 App. D. C. 293. It may be noted that interest at the rate of 6% per annum has been paid depositors
 after suspension in the liquidation of the following
 71 insolvent banks in the District of Columbia since the

bank moratorium of March 6, 1933: Chevy Chase Savings Bank; District National Bank; Northeast Savings Bank; Seventh Street Savings Bank and Washington Savings Bank.

Upon a consideration of the undisputed facts and the controlling principles of law it is apparent that defendant Cooper must fail as to all contentions raised by his substituted counterclaim. His motion for summary judgment is therefore overruled and the motion of plaintiff for summary judgment is sustained. Counsel for plaintiff will present appropriate orders.

F. DICKINSON LETTS,
Justice.

**72 Order Overruling Motion of Defendant Cooper
for Summary Judgment and Sustaining Motion
of Plaintiff for Summary Judgment.**

(Filed June 23, 1944.)

This cause came on for consideration upon the motion of Defendant Wade H. Cooper for Summary Judgment, filed herein May 4, 1944, and upon the motion of plaintiff for Summary Judgment, filed herein May 12, 1944, both motions being founded upon defendant Cooper's Substituted Counterclaim and plaintiff's Reply thereto, and, it appearing from the undisputed facts and the controlling principles of law that defendant Cooper's Substituted Counterclaim is without merit and all his contentions raised thereby must fail and that plaintiff's contentions should be sustained, it is by the court this 23d day of June, 1944,

ORDERED, that said Motion of Defendant Wade H. Cooper for Summary Judgment be and it is hereby overruled.

IT IS FURTHER ORDERED, that said Motion of

Plaintiff for Summary Judgment be and it is hereby sustained and the relief sought therein granted.

/s/ F. DICKINSON LETTS,
Justice.

Seen and objected to

/s/ WADE H. COOPER

**Order Overruling Motion of Wade H. Cooper to Vacate
and Set Aside the Order of June 20, 1944.**

(Filed July 5th, 1944.)

Upon consideration of the motion of Wade H. Cooper to vacate and set aside the order of June 23, 1944, and it appearing that said motion also seeks a new trial or rehearing, and it further appearing that said motion fails to set forth any valid grounds for setting aside said order or for granting a rehearing, it is by the court this 5th day of July, 1944,

Ordered, that said motion of Wade H. Cooper to vacate and set aside the order of June 23, 1944, and for a new trial or rehearing of this cause be and it is hereby overruled.

F. DICKINSON LETTS,
Justice.

75 Affidavit of Defendant Wade H. Cooper.

(Filed Nov. 5th, 1943.)

In support of his motion for a summary judgment in this cause the defendant Wade H. Cooper, upon oath, says

1. That he files herewith, as a part hereof, obtained from the Comptroller's office, reports of the Receiver of the United States Savings Bank of September 30, 1934, marked Exhibit "A"; report of March 31, 1935, marked Exhibit "B"; report of March 31, 1937, marked Exhibit "C"; report of March 31, 1938, marked Exhibit "D"; and report of February 21, 1941, marked Exhibit "E";

2. That the purpose of filing these reports is to show that according to the reports, the Comptroller could have paid all proven claims of depositors, if not all depositors in full, on any of these dates, if he had not restored or repaid the money to the lenders instead of paying it to the depositors. The report of September 30, 1934 shows collections and borrowings of \$1,801,229.15 or more than a sufficient amount to pay all proven claims of \$1,512,387.79; but the report of March 31, 1935 shows collections and borrowings of \$2,753,119.82, whereas the proven claims were \$1,581,340.81, unproven claims \$128,559.69; this report shows \$771,193.12 repaid to the R. F. C., and cash on hand \$281,846.96, and therefore depositors could have been paid in full, according to this report unless the money had been restored to the lenders as shown by the report. The reports all seem to indicate that depositors could have been paid in full at any time, if the money had not been restored to the lenders.

WADE H. COOPER.

Sworn to and subscribed to, before me
this 1st day of November, 1943.

Katherine I. Kenny,
Notary Public, D. C.

From Exhibit "A" of September 30, 1934

77	"Costs of Liquidation	\$ 60,411.00
	Dividends paid to Unsecured Creditors (65%)	983,053.49
	Reconstruction Finance Corporation Loans Repaid	153,710.26
	Cash in hands of Receiver & Comptroller	14,637.46
	Secured and Preferred Liabilities Paid in Cash	
	(By Receiver \$ 88,595.67)	
	(By Conservator \$499,193.12)	587,788.79
	Reconstruction Finance Corporation Loans Received	907,300.00
	Total Collections Accounted For.....	1,801,229.15

Unsecured Liabilities for which Receiver's Certificates have been issued 1,512,387.79"

From Exhibit "B" of March 31, 1935

79	"Expenses of Receivership	\$ 78,090.80
	Dividends Paid to Unsecured Creditors (65%)	1,027,873.27
	Reconstruction Finance Corporation Loans Repaid	771,193.12
	Cash in hands of Receiver & Comptroller	281,846.96
	Preferred Liabilities Paid in Cash (By Receiver \$ 93,471.92) (By Conservator 499,193.12)	592,665.04
	Reconstruction Finance Corporation Loans Received	1,445,793.12
	Total Collections Accounted For.....	2,753,119.82
	Unsecured Liabilities for which Receiver's Certificates have been issued	1,581,340.81"

From Exhibit "C" of March 31, 1937

81	"Costs of Liquidation	\$ 138,317.80
	Dividends Paid to Unsecured Creditors (90%)	1,456,742.08
	Preferred Liabilities Paid in Cash (By Receiver \$ 95,279.53) (By Conservator 499,193.12)	594,472.65
	Reconstruction Finance Corporation Loans Repaid	1,853,191.02
	Cash in hands of Receiver & Comptroller	22,882.57
	Reconstruction Finance Corporation Loans Received	1,983,191.02
	Total Collections Accounted For.....	2,610,168.05
	Unsecured Liabilities for which Receiver's Certificates have been issued	1,618,593.81"

From Exhibit "D" of March 31, 1938

83	"Costs of Liquidation	\$ 161,314.67
	Dividends Paid to Unsecured Creditors (100%)	1,619,292.02
	Reconstruction Finance Corporation and other Loans Repaid	2,000,691.02
	Cash in hands of Receiver & Comptroller	26,837.70

Preferred Liabilities Paid.....	594,509.42
Reconstruction Finance Corporation and other Loans Received	2,088,991.02
Total Collections Accounted For.....	4,945,569.23
Unsecured Liabilities for which Re- ceiver's Certificates have been issued	1,619,292.10''

From Exhibit "E" of February 21, 1941

85 "Costs of Liquidation	\$ 217,815.18
Dividends Paid to Unsecured Cred- itors (100%)	1,630,112.33
Reconstruction Finance Corporation and other Loans Repaid	2,093,491.02
Cash in hands of Receiver & Comp- troller	101,400.75
Preferred Liabilities Paid	595,013.59
Reconstruction Finance Corporation and other Loans Received	2,093,491.02
Total Collections Accounted For.....	5,181,819.58
Unsecured Liabilities for which Re- ceiver's Certificates have been issued	1,629,724.30''

86 **Second Affidavit of Wade H. Cooper.**

(Filed Nov. 23d, 1943.)

In this cause defendant, Wade H. Cooper, states on oath that the attached paper, dated October 22, 1943, furnished him by the Reconstruction Finance Corporation, as showing all loans made by the said corporation to the United States Savings Bank or its Receiver for the period covered in the said paper, which is attached hereto and made a part hereof, marked Exhibit "E." Said paper or statement shows loans as follows:

<i>Date</i>	<i>Amount of Note</i>	<i>Amount Disbursed</i>
2/28/33	\$ 75,000.00	\$ 75,000.00
4/23/34	1,080,000.00	950,100.00
3/31/35	775,000.00	632,700.00
3/31/36	375,000.00	240,558.65

WADE H. COOPER.

Exhibit "B" to Petition * * * for Authority to Compromise Certain Stock Assessment Claims, Filed, District Court, Dec. 7, 1943, Miscellaneous Docket No. 40.

(Copy)

91

NORMAN FISCHER

ATTORNEY AT LAW

Edmonds Building

November 15, 1943

Mr. R. C. Parsons,
Receiver, United States Savings Bank
c/o Comptroller of the Currency
Treasury Department
Washington, D. C.

Dear Sir:

* * * * *

"This offer is made without prejudice, subject to the approval of the United States Court for the District of Columbia, and with the understanding:

1. That should the present suit be continued and result in final judgment in favor of the stockholders;
2. That should the Courts in any pending or future litigation determine and finally adjudicate that there was no interest due to the depositors of the United States Savings Bank;
3. Or that it is ultimately determined that the proceeds of the liquidation of the assets of the bank are sufficient, without recourse to stock assessments, to pay the expenses of administration and all legal claims of depositors and creditors for both principal and interest,

92 Then, and in either of said events, the said sum of \$4,000.00 offered herewith, will be returned to these stockholders in its entirety.

* * * * *

Yours very truly,

(s/d) **NORMAN FISCHER,**

(s/d) **WALTER M. BASTIAN.**

f/p

95 **Final Order Confirming Sale of United States
Savings Bank Building.**

(Filed Dec. 23, 1943.)

This matter came on for final hearing on December 23, 1943, pursuant to an Order *Nisi* entered herein December 7, 1943, authorizing petitioner, R. C. Parsons, Receiver of the United States Savings Bank, to accept an offer of \$45,000 net cash from The Chesapeake and Potomac Telephone Company for the sale of the Bank Building, unless cause to the contrary be shown or a higher net cash offer acceptable to the court be made on or before said 23rd day of December, 1943, and upon consideration of said Order *Nisi* together with the Receiver's petition of the same date and the Report of R. C. Parsons, Receiver, filed herein December 23, 1943, and after hearing all objections filed of record or presented in open court and it appearing that no cause to the contrary has been established and that a higher net cash offer has been made by Isadore Nochlin and Sam Schwartz in the amount of \$80,000.00, it is by the court this 23rd day of December, 1943,

ORDERED, that said R. C. Parsons, as Receiver of the United States Savings Bank, be and he hereby is authorized to accept not less than \$80,000.00 net cash from Isadore Nochlin and Sam Schwartz for the sale and conveyance to said Isadore Nochlin and Sam Schwartz.

* * * * *

96 /s/ F. DICKINSON LETTS,
Justice.

88 **Affidavit of Wade H. Cooper.**

(Filed January 28, 1944.)

In this cause, defendant Wade H. Cooper, being duly sworn, on oath says:

That the \$1,915,000. of assets classified by Examiner Wm. M. Taylor as "Acceptable" in his report of March 1933,

filed in the case of Cooper v. Woodin, *et al.*, Equity No. 56,143 of this Court in the Fall of 1933, "was good enough for any bank," as testified by said Examiner Taylor during the hearing of said cause, as is evidenced by the stenographic report of his testimony, in the possession of this affiant, as a part of the record in said cause, Equity No. 56,143. Affiant further says that, within a few days following the reopening of the banks closed by Order of the President in March 1933, after confidence had been restored, all of said paper or assets of \$1,915,000., "good enough for any bank," could have been sold and should have been sold at face value by the Comptroller of the Currency, and the proceeds distributed to the depositors and creditors of said United States Savings Bank, within Ninety (90) days or three months, as required by law, if the Comptroller honestly believed the said Bank was insolvent as he later stated, on oath, that he did. Such a sale would have eliminated the question of interest entirely.

WADE H. COOPER.

98

EXHIBIT I.

98 **Exhibit I to Petition for Authority to Accept Compromise Offer of Wade H. Cooper, Filed Feb. 14, 1944, District Court, Miscellaneous No. 40.**

Washington, D. C.
February 12, 1944

United States Savings Bank
c/o Comptroller of the Currency
Treasury Department
Washington, D. C.

Dear Sir:

Reference is made to the outstanding order of the local United States District Court wherein you, as Receiver, are authorized to settle any double assessment liability of

the shareholders of the United States Savings Bank upon receipt of the sum of \$13.25 for each share owned.

I hereby tender you certain claims against this receivership which I own through assignment and which are listed in Exhibit A hereto attached in settlement of the stock assessment liability asserted against me in the case of R. C. Parsons vs. Catherine Barry *et al.*, (Equity #65,140), levied upon 560 shares, it being understood that the claims have a value of approximately 9% of their face amount, as estimated by you at this time.

It is believed that the claims listed in Exhibit A and attached hereto computed at 9% will be sufficient to effectuate this settlement but if it is necessary to do so, I will supplement these assigned claims by sufficient cash to bring the settlement to \$13.25 per share.

This settlement offer is made without prejudice to any and all contentions made by me in previous litigation or that I may make in subsequent litigation, and the offer is subject in all respects to the offer submitted by attorneys Bastian and Fischer in their letter to you dated November 15, 1943. I do not waive any of my rights, either legal or equitable, growing out of the facts or the law in regard to the appointment of a Receiver of said bank on February 10, 1934 or in regard to the amount of interest due, if any, and for what date due, if any, reserving the right to have all these questions determined by the courts.

Should the court refuse to approve this proposed settlement, all of said assignments are to be returned to me.

Very truly yours,

(Signed) WADE H. COOPER.

99 Order Authorizing Receiver to Accept Compromise Offer of Wade H. Cooper.

(Filed Feby. 14th, 1944.)

Upon consideration of the petition of R. C. Parsons, Receiver of the United States Savings Bank, for authority

to accept the compromise offer of Wade H. Cooper, said petition having been filed herein February 14, 1944, it is by the court this 14th day of February, 1944,

ORDERED, That said R. C. Parsons, petitioner herein, be and he hereby is authorized to accept the compromise offer of Wade H. Cooper and pursuant thereto to accept from Wade H. Cooper, in lieu of and as the equivalent of cash, in full compromise settlement of all stock assessment claims asserted by petitioner against him in the case of Parsons, Receiver, v. Barry, *et al.*, Equity No. 65140 in this court, certain claims heretofore assigned by certain depositors to said Wade H. Cooper, as set forth in the above noted petition, and representing claims against the receivership for the payment of a possible interest dividend having a presently estimated value of 9% of the principal amounts thereof and aggregating the sum of approximately \$7,420.00, said sum being the equivalent of \$13.25 per share for the 560 shares of stock of said United States Savings Bank owned by said Wade H. Cooper, and said compromise being in keeping with and on the same basis
100 as that authorized by the orders of this court heretofore entered in these proceedings on December 7, 1943 and January 18, 1944 respectively.

F. DICKINSON LETTS,
Justice.

(Filed Feb. 17, 1944.)

WADE H. COOPER, being duly sworn, says that he was President and director of the United States Savings Bank involved in this case; that the said Bank received savings and demand deposits, a great part of the deposits being savings deposits upon which 3% interest per annum was paid; that he does not at this time have access to the rec-

ords, but as he remembers, the Savings deposits constituted approximately two-thirds of the total deposits, and the demand deposits, approximately one-third, upon which no interest was paid.

WADE H. COOPER.

90

Affidavit of Wade H. Cooper.

(Filed May 4th, 1944.)

In the above entitled cause, Equity No. 65,140, Wade H. Cooper being duly sworn says:

That in a canvass of a number of the larger or largest banks in the District of Columbia, he was informed that the highest rate of interest paid by banks and trust companies in the District, was one per cent, some of them reducing the rate to one-half of one percent on sums above \$1,000. and some of them paying one percent on a higher figure, but all of them having a limitation in the amount.

WADE H. COOPER.

101

"Thereupon the case was appealed by defendant Wade H. Cooper to the United States Court of Appeals for the District of Columbia; see Notice of Appeal, record page 101."

102

Statement of Points.

(Filed Aug. 28, 1944.)

1. The lower Court was in error in holding that the Act of the Legislature of West Virginia passed February 26, 1929, prohibiting all banks "chartered and authorized to engage in business under the laws of this State," from engaging in business "at any other place than its principal office in the State of West Virginia," did not apply to the United States Savings Bank; and also in error in holding that the said Bank was liable for interest and that its acts

were not *ultra vires* subsequent to the passage of said Act; and also in error in holding that the defendant Cooper was estopped from relying upon the same.

2. The lower Court was in error in holding that the Savings depositors were entitled to 6% interest instead of 3% as fixed by the contract, in direct violation of §28-2707 of the D. C. Code of 1940; and in violation of both the Constitution of the United States and the Constitution of the State of West Virginia, both of which prohibit the impairment of contractual obligations.

3. The lower Court was in error in holding that the demand depositors were entitled to 6% interest in violation of their agreement or contract *not* to receive any interest and in violation of the law as laid down by this Court in *Kimball v. Williams*, 36 App. D. C. which specifically declares that the acceptance of the principal presumes waiver of interest in the absence of a contract to pay interest.

4. The lower Court was in error in holding that the arbitrary and fraudulent acts charged were immaterial and irrelevant and *res judicata*, as the records show that none of them had ever been passed upon in any trial on its merits at any time in any case; and to deny defendant and counterclaimant Cooper a fair and impartial trial on its merits was and is in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

5. The lower Court was in error in holding that the United States Savings Bank was liable for interest during the eleven months period of the conservatorship
103 when the former Comptroller, contrary to the law requiring an immediate liquidation, arbitrarily kept the Bank in the hands of a conservator for the unlawful purpose of using it in the organization of the Hamilton National Bank of his own promotion.

6. The lower Court was in error in holding that the arbitrary refusal of the Comptroller to disburse cash on hand, and convert assets into cash and disburse the proceeds, as charged in the substituted counterclaim, were immaterial and irrelevant.

7. The lower Court was in error in holding that the arbitrary and fraudulent acts charged are *res adjudicata* and are insufficient in factual averments, showing that the Bank was arbitrarily or fraudulently closed.

8. The lower Court was in error in abrogating the contract to pay the savings depositors 3%, as such action is

in violation of Clause 1, Sec. 10 of Article 1 of the Constitution of the United States prohibiting any law impairing the obligation of contracts; and also in violation of Article 11, Sec. 6 of the Constitution of the State of West Virginia prohibiting the impairment of contractual obligations; as well as in violation of §28-2707 of the 1940 Code of the District of Columbia, enacted by the Congress of the United States in 1901.

9. The lower Court was in error in permitting the Appellee or Plaintiff below to make an additional motion to strike subsequent to the filing of his answer, without leave to withdraw his answer.

10. The lower Court was in error in its holding to the effect that the \$65,000 dissipated and wasted as set out in Paragraphs 17 and 23 of the substituted counterclaim were immaterial and irrelevant, and that the \$30,000 lost as stated in Para. 18 as the result of gross negligence in the collection of interest and the payment of taxes, was immaterial and irrelevant, as neither the Bank or its stockholders should be required to suffer the losses caused by any of the foregoing unlawful or arbitrary acts, or acts of gross negligence.

104 11. The lower Court was in error in refusing to allow the depositors to file a petition in this cause, urging a settlement upon a basis of 3% to all depositors, as a majority, in amount, had agreed.

12. The Plaintiff Receiver is without authority, as the acts of the Bank were *ultra vires* following the prohibition act of Feb. 26, 1929.

13. Appellant Cooper was denied a fair and impartial trial in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, for the reason that the Court (Mr. Justice Letts), upon petition of Appellee Receiver had, over the earnest protest of Appellant Cooper, arbitrarily ordered the Bank building sold prior to any adjudication of the interest question at issue, by this act placing the court in the unfair and prejudicial position of having to render a decision in the instant case in favor of the Appellee Receiver, in order to maintain its position in approving the sale of the building.

14. The lower Court was in error in all its Conclusions, both as to the law and the facts in controversy, and in refusing to refer the case to the Auditor to report the facts and fix a fair and just rate of interest, if any, to be paid.

WADE H. COOPER.

**BRIEF AND APPENDIX
FOR APPELLEE**

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

OCTOBER TERM, 1944.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED DEC 7 - 1944

No. 8872

Joseph W. Stewart

CLERK

WADE H. COOPER, *Appellant,*

v.

R. C. PARSONS, Receiver of the United States
Savings Bank, *Appellee.*

**Appeal from the District Court of the United States for the
District of Columbia.**

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

OCTOBER TERM, 1944.

No. 8872.

WADE H. COOPER, *Appellant*,

v.

R. C. PARSONS, Receiver of the United States
Savings Bank, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

APPELLEE'S BRIEF.

PRELIMINARY STATEMENT.

In this case the District Court entered a final order June 23, 1944 (Joint App. p. 45) overruling appellant's Motion for Summary Judgment (Joint App. p. 27) and sustaining a like motion filed by appellee (Joint App. p. 29). These

countermotions were founded upon the material facts established by appellant's Substituted Counterclaim (Joint App. p. 3) and appellee's Reply (Joint App. p. 15) together with certain exhibits, affidavits and other matters judicially noticed by the Court.

While appellant's Statement of the Case tends to be argumentative and in some instances misleading—as where he refers to the payment of 100 per cent to the depositors within a composite or aggregate period of thirteen months (Appellant's Brief, p. 2) when it is an admitted fact of record that the dividend payments to depositors covered a period of nearly four years from June 28, 1934 to March 15, 1938 (Joint App. pp. 3, 16, 40)—nevertheless, said statement does indicate the background of this litigation and the principal proceedings that have taken place therein. Furthermore, the clear, concise and completely adequate statement of the material facts and issues by Mr. Justice Letts of the District Court in his Memorandum Opinion filed June 15, 1944 (Joint App. p. 39) obviates the necessity for a counterstatement by appellee.

It might further be observed, however, that the original suit filed by the receiver August 10, 1937, followed by the amended complaint in January 1939, was solely an action against appellant Cooper and the other shareholders of the bank to recover an assessment levied against them by the Comptroller of the Currency. Said proceedings were bitterly contested at all stages until finally, in February, 1941, a plan of settlement was entered into between the receiver and the stockholders. The plan was later repudiated by appellant Cooper and was also attacked by certain depositors with the result that said plan was ultimately set aside by this Court in the case of *Cooper and Fraser, et al. v. Goldsmith, et al.* (Nos. 8369 and 8370), 77 U. S. App. D. C. 392, 135 F. (2d) 949. Subsequent proceedings led to the compromise of the assessment liability first with the other defendant stockholders and later with appellant (Joint App. pp. 52 and 53), said compromise being

without prejudice to the rights and claims of the parties regarding the ownership of the remaining funds in the receiver's hands. Pursuant to said compromise the District Court entered an order permitting appellant Cooper to raise these questions by counterclaim in this case, with the further proviso that, upon the filing of such counterclaim, the receiver's amended complaint to enforce the assessment would stand dismissed (photostatic Transcript of Record, pp. 10 and 11).

It will be noted at this point that, upon appellee's motion (Joint App. p. 11), certain portions of appellant's Substituted Counterclaim were stricken by order of the District Court (Joint App. p. 15). The grounds for striking these portions were fully set forth in said motion, and, since appellant continues to assert and rely on the stricken material in his argument (Appellant's Brief, pp. 39-45, 47-48), said grounds are hereby specifically adopted and made a part of appellee's brief by this reference (Joint App. pp. 11-14).

Although appellant's Substituted Counterclaim (Joint App. pp. 3-11) is replete with unfounded conclusions and impertinent and immaterial charges and assertions to which appellee has replied (Joint App. pp. 15-22), it seems clear that no real issues as to any material facts were raised by said pleadings but only questions of law to be determined by the court (Rule 56(c) F. R. C. P.). In that connection appellee's Motion for Summary Judgment (Joint App. pp. 29-34), based upon these pleadings and the established or admitted facts, carefully sets forth the declaratory relief sought by appellee. The opinion and ruling of Mr. Justice Letts (Joint App. pp. 39-45), sustaining said motion and denying appellant's motion, completely disposes of the contentions urged by appellant and fully supports the final order granting said relief. That said decision was correct in all respects is established by the ensuing authorities and argument.

But first it must be observed, with regret, that appellant has seen fit to state that Mr. Justice Letts was prejudiced

against him and denied him a fair and impartial hearing (Appellant's Brief, pp. 13-14, 49-50). Nothing could be farther from the truth. Appellant can not point to a single disclosure in the record nor can he name a single instance in the course of any of the numerous hearings before Justice Letts where appellant was denied the right to be heard or where his arguments and objections were not given due and patient consideration.

Furthermore, the extent to which appellant is forced to go in an effort to give color to his desperate accusation is exemplified by his misstatement of the proceedings involving the sale of the bank building (Miscellaneous No. 40 in the District Court). The final order confirming the sale of the building which appellant has included as part of this record (Joint App. p. 51) carefully recites the fact that an *Order Nisi* was entered by the court in connection with the \$45,000 offer, and that, at the final hearing more than two weeks later, written and oral objections were heard and disposed of and higher bids received. It is to the credit of Mr. Justice Letts that, notwithstanding the "activities" of appellant and his friends, the sale of the building was finally consummated for the unexpectedly high figure of \$80,000. Obviously, the liquidation of this last remaining physical asset of the bank and the court's confirmation thereof, as required by law (12 U. S. C. A. Sec. 192; R. S. Sec. 5234), can have no bearing whatsoever upon Justice Letts' decision in this case, wherein he has followed the overwhelming weight of authority as to the right of depositors to interest on their claims.

SUMMARY OF ARGUMENT.

I.

The United States Savings Bank having been chartered in West Virginia in 1906 to do business in the District of Columbia, the conduct of such business exclusively at its principal and only office in said District, thereafter until the date of closing, March 6, 1933, was not *ultra vires* under

the West Virginia Statute of February 28, 1929, prohibiting the maintenance of branch banks by institutions chartered and engaged in business in that state under the laws thereof; furthermore, the question cannot be raised collaterally but only by the State in a proper proceeding; and, in any event, appellant Cooper, having benefitted as an officer and stockholder from the operation of said bank and having held it out as a going corporate entity, is estopped to deny the validity of the Bank's corporate existence and business for the purpose of defeating the claims and rights of depositors.

II.

When the assets of an insolvent bank being liquidated under the Comptroller of the Currency prove sufficient to pay more than 100 per cent of the principal amount of the depositors' claims, said depositors are entitled to interest as damages on their claims from the date of suspension until paid, computed at the statutory or legal rate of the jurisdiction in which the liquidation is conducted; furthermore,

(a) This proposition is fully applicable and controlling here as to the United States Savings Bank, which, though incorporated in West Virginia, conducted its sole banking business within the District of Columbia and hence, under the laws of said District, Section 713, 1901 D. C. Code (Sec. 26-101, 1940 D. C. Code), became subject, both in operation and insolvency, to the supervision and control of the Comptroller of the Currency to the same extent as if it were a national bank;

(b) As provided in Section 1178 of the 1901 Code as amended (Sec. 28-2701, 1940 D. C. Code), the rate of said interest in the District of Columbia is 6 per cent per annum, and, there being no contract nor agreement with any of the depositors fixing a different rate of

interest as damages in the event of default for any reason including insolvency, said interest of 6 per cent is payable to all depositors alike whether their deposits were time or demand deposits prior to suspension, with the result that ratability in distribution is attained as required by the National Bank Act (R.S. 5236, 12 U.S.C.A. 194);

(c) Said interest is computed upon the unpaid balances of said claims for the full period, including the eleven months of the conservatorship, from the date of suspension until the final payment of the principal amount thereof; and

(d) There is nothing under the West Virginia law or under alleged equitable considerations which is contrary to or at variance with this basic proposition that the depositors are entitled to said interest on their claims before any of the remaining assets may be turned over to the stockholders.

III.

The Comptroller's determination of insolvency, appointment of a receiver and liquidation of the assets of a bank subject to his supervision and control are matters exclusively within his jurisdiction and discretion and cannot be reviewed except for actual fraud; accordingly, appellant Cooper's argumentative and speculative allegations, charges and conclusions regarding the solvency of the United States Savings Bank and the allegedly arbitrary and wrongful acts of the former Comptroller in closing and liquidating said bank—all wholly unsupported by real factual averments disclosing actual fraud or bad faith—not only raise no issue as to any material facts in this case but are irrelevant and immaterial as regards the question of the ownership of the net remaining cash in the hands of the receiver; furthermore, said matters have all become *res judicata* by reason of the decisions of the District Court

and this Court in prior litigation (particularly the cases of *Cooper v. Woodin*, 63 App. D. C. 311, and *United States Savings Bank v. Morgenthau*, 66 App. D. C. 234) involving the appellant, the Comptroller of the Currency and this receivership.

ARGUMENT.

I.

Ultra Vires Acts.

The business of the United States Savings Bank, a West Virginia corporation conducting its affairs exclusively in the District of Columbia, was not ultra vires under the West Virginia Statute of February 28, 1929 prohibiting branch banks; furthermore, the question cannot be raised collaterally and has no bearing upon the right of depositors to interest on their claims; and, in any event, appellant Cooper, having benefitted as an officer and stockholder from the operation of the bank, and having held it out as a going corporate entity, is estopped to deny the validity of the Bank's corporate existence and business.

Section 3131, 1932 West Virginia Code (Act of February 28, 1929) provides in part as follows:

“No banking institution chartered and authorized to engage in business under the laws of this state, shall hereafter install or maintain any branch bank, or engage in business at any place other than at its principal office in the State of West Virginia; or engage in any business other than as authorized in this article.

* * *

The actual scope of this section is indicated by its title—*Branch Banks Forbidden; Bank Not to Sign Indemnity Contract or Pledge Its Assets to Indemnify a Surety; Exception as to Guarantee of Federal Deposits and Deposits of State and Division Thereof*. It is true that the title of a statute cannot be used to restrict or to extend the purview of the statute; but it is equally true, in case of ambiguity, that the title may be considered in determining the legislative in-

tent. *United States v. Katz*, 271 U. S. 354, 70 L. Ed. 986. When considered in this light, the language of the above statute clearly lends itself to the proposition that the legislature intended only to prohibit branch banks in West Virginia, not to repeal the charters of banks organized there to do business elsewhere.

It follows that this statute by its terms clearly does not apply to a bank such as the United States Savings Bank legally incorporated in the State of West Virginia prior to enactment of this statute for the specific purpose as stated in its charter of conducting its banking business in the District of Columbia, said charter providing further (Joint App. p. 1):

“The Principal Place of Business of said Corporation shall be located in the city of Washington, District of Columbia. Its chief works will be located in same place.”

This construction of Section 3131 is obviously logical and sensible as compared with appellant's construction which involves the revocation or forfeiture of valuable rights acquired by this bank under its admittedly valid charter of 1906. Under the circumstances, the statute must be strictly construed against any such implied forfeiture and it becomes not only proper but imperative to consider the title as well as other provisions of the West Virginia law in determining the legislative intent. *Baxter v. McGee* (C.C.A. 8th) 82 F. (2d) 695, 701; *Clawans v. Sheetz*, 67 App. D. C. 366, 92 F. (2d) 517, 521.

The intention of the West Virginia legislature in this respect is further indicated by the subsequent enactment of February 4, 1937 (Section 3224, 1937 West Virginia Code) which reads in part as follows:

“3224 (3) *Banking Institutions Incorporated in, But Doing Business Entirely Without State.*

“* * * The officers and directors of such non-resident banking institutions may all be non-residents of the State of West Virginia, and such non-resident banking

institutions may conduct the banking business at such place or places outside of the State of West Virginia as they may be permitted under the laws of the jurisdiction in which such place or places are situated. The restrictions in the banking laws of this State contained as to establishment and maintenance of branch banks shall not be applicable to said non-resident banks, but no non-resident bank shall operate or maintain any branch bank in this State * * *."

There is nothing in this section to indicate a change or modification of the then existing West Virginia law. Rather, it consists of an interpretation whereby it is made absolutely clear that such non-resident banking institutions as the United States Savings Bank are not subject to those provisions of the West Virginia laws which by their terms and practical operation would properly be applicable only to West Virginia banks actually engaged in business within that state. In this connection it should also be noted that three substantial Washington banks, all organized under the laws of West Virginia prior to 1929, have continued in business in the District of Columbia since 1929 without any suspicion by their boards of directors, or by the West Virginia authorities or the Comptroller of the Currency that this 1929 West Virginia statute had the purpose or effect suggested by appellant.

Assuming, however, that Section 3131 might have been held applicable in its inception to the United States Savings Bank, nevertheless any question as to the legality of the bank's existence or the validity of its business under such a statute could be raised only by the state in a proper proceeding; it cannot be raised collaterally as is sought to be done by appellant Cooper in these proceedings. See 50 A.L.R. 1359, citing *Bank of Tupelo v. Stonum*, 281 S.W. 110, page 112, decided by the Missouri Court of Appeals in 1926, and *Morehead Banking Company v. Tate*, 122 N.C. 313, 30 S.E. 341. See also *American Surety Company of New York v. Moran*, 64 App. D. C. 127, 75 F. (2d) 646, p. 648, where this Court stated:

“It has been held that the lawful proceeding in case of actions ultra vires by a corporation is a suit by the sovereign which granted the charter of the corporation.”

Likewise in point is Judge Parker's statement in *Poole v. Elliott* (C.C.A. 4th, 1935), 76 F. (2d) 772, 774, that “The fact that the operation of a branch may not be authorized does not change the nature of the contract with the depositor therein.”

In any event, appellant Cooper as a stockholder, director and officer of the Bank during and after 1929 is clearly estopped to deny the corporate existence of the bank or the validity of its banking transactions which admittedly inured to his benefit during the entire period in question. As disclosed by appellee's affidavit, Exhibit I to his Motion for Summary Judgment in the District Court (Joint App. pp. 34, 35), it is established by the bank's records that dividend distributions were declared and paid to the stockholders, including appellant Cooper, during the period from 1929 to 1933, as follows: 40% in 1929, 30% in 1930, 30% in 1931, and 26½% in 1932, the final quarterly dividend in 1932 having been declared at a meeting of the Board of Directors presided over by appellant Cooper on December 14, 1932—less than three months before the closing of the bank! (Joint App. p. 37)

It is equally well established that appellant Cooper and his fellow stockholders, officers and directors held themselves out to the public and represented themselves to the Comptroller of the Currency at all times during this period as an existing and valid corporate banking entity. This is evidenced by the sworn reports of condition of the bank of September 30 and December 31, 1932, executed by appellant Cooper and the other directors (photostatic Transcript of Record pp. 55-58, 60-63), wherein are found various incidents of corporate existence such as references to: “Capital stock paid in”, “Surplus”, “Reserves for Dividends, Contingencies, etc.”, “Names of Officers and

Directors * * * and Shares Owned", etc. (Joint App. p. 38).

This representation is also evidenced by the sworn Bill of Complaint which appellant Cooper filed in the District Court, June 28, 1934, in the case of *United States Savings Bank v. Morgenthau, et al*, Equity No. 57344 in said court (66 App. D. C. 234, 85 F. (2d) 811, Cert. den. 299 U. S. 605, 81 L. Ed. 446, Reh. den. 301 U. S. 713, 81 L. Ed. 1365), wherein he alleged under oath (Paragraph I of said Bill) that the United States Savings Bank was a banking corporation doing a banking business in the city of Washington and that he was "the owner of fifty-six (56%) percent of the capital stock * * * and its President and Chief Executive Officer" (see Transcript of Record, *United States Savings Bank v. Morgenthau*, No. 6605 in this Court, p. 2). Paragraph III of said Bill of Complaint is also pertinent (Transcript of Record, No. 6605, p. 3):

"Prior to the middle of the year 1932, the United States Savings Bank was a thriving prosperous banking corporation, with a capital stock of \$100,000.00 and surplus and undivided profits approximating \$250,000.00, which had been earning and/or paying dividends on its capital stock at the rate of 30 to 40 percent per annum for a period of years, * * * "

Substantially similar allegations were later set forth by appellant Cooper in his Declaration filed February 9, 1937, in the case of *Cooper v. O'Connor, et al.*, At Law No. 88516 in the District Court (Transcript of Record, *Cooper v. O'Connor*, No. 6976 in this Court, pp. 2 and 7).

It will be recalled at this point that the above-noted *Morgenthau* case was filed by appellant Cooper for the purpose of terminating this receivership and restoring this "banking corporation" to its officers, directors and stockholders so that they could again hold themselves out to the public as a corporation for the conduct of a banking business. It seems manifest that the appellant cannot now be heard to deny the validity of these corporate transactions for the purpose of depriving the depositors of interest on

their deposits—deposits which were invited by him and the other stockholders holding themselves out as a valid banking corporation.

The law is clear that appellant is estopped to assert such a position. Thus, see the leading case of *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, which involved a stockholders assessment action by the receiver of the New Orleans National Banking Association which had originally been organized and operated as a state banking corporation known as the Bank of New Orleans. The defendant stockholder pleaded that there was no such national banking corporation in existence because the Bank of New Orleans had no power under its charter and no authority from the State of Louisiana to change its organization to that of a national bank, and also because the owners of two-thirds of the stock did not authorize the bank to be converted into a national bank under the laws of the United States. The Supreme Court rejected these contentions and held the defendant liable for the assessment, stating as follows on p. 170 of 24 L. Ed.:

“There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it.”

This Court has also had occasion to consider these principles in the cases of *American Surety Co. of New York v. Moran*, 64 App. D. C. 127, 75 F. (2d) 646, and *Thompson v.*

Park Savings Bank, 64 App. D. C. 308, 77 F. (2d) 955, both involving the insolvent Park Savings Bank—an Alabama corporation which had conducted its sole banking business in the District of Columbia until it was closed by the President's proclamation of March 6, 1933, and whose charter had expired by statutory limitation on August 30, 1929. In the *American Surety Co.* case, the court used the following language on page 648 of 75 F. (2d):

“The sole defense presented by the plea, therefore, is that the bank was acting ultra vires when continuing its banking business, and that the indemnity contract incident to such business was likewise ultra vires and void, and that the defendant, having received and retained the benefits accruing to it under its bond, may now refuse to discharge the obligations thereby assumed by it. This contention cannot be sustained.”

In *Thompson v. Park Savings Bank*, *supra*, the depositors were suing the directors of the bank in an effort to hold them personally and individually responsible for the deposits which came into the bank subsequent to August 30, 1929, the date on which the charter expired. Since corporate organization ordinarily precludes personal liability the attempt to hold the directors of that bank liable as individuals or as partners necessarily had to be founded upon a denial of the corporate existence during the period after the expiration of the charter. This court held, however, that the depositors were estopped to deny the corporate entity, stating as follows on page 959 of 77 F. (2d):

“The action of the bank in continuing the banking business after August 30, 1929, was ultra vires, but this did not have the effect of dissolving the corporation, for such a dissolution in invitum could be effected only by appropriate action of the state of Alabama. So long, therefore, as Alabama took no action to dissolve the corporation, it continued to exist, notwithstanding the fact that the conduct of its business as a general banking corporation was ultra vires.
* * * However, whether it be said that the action of

the bank in this particular was that of a de jure corporation acting ultra vires, or was that of a de facto corporation acting totally beyond any de jure powers, does not seem to be controlling in this case. In either view the bank purported to act as a corporation, and the depositors dealt with it as such. * * *

“The persons thereafter dealing with the corporation as depositors were charged with a knowledge of the terms of the corporate charter. They therefore knew, either actually or constructively, that the bank was not then authorized by its charter to proceed with a general banking business. Therefore they are estopped to deny the legality of the bank’s actions and cannot hold the directors or stockholders liable individually or as partners.”

It follows as a necessary corollary of that decision that, since appellant Cooper (and the other stockholders) openly held the bank out to the public as an existing corporate entity and so represented it in the sworn reports of condition to the Comptroller of the Currency during the entire period from February 28, 1929, to March 6, 1933, and since appellant has admittedly benefitted from the corporate banking transactions during that time, he is clearly estopped to deny the validity of the corporate existence and business for the specifically asserted purpose of depriving the depositors of their interest dividend. The power of protection of depositors under such circumstances is well established. Witness the language of the Supreme Court of the United States in *Deitrick v. Greaney*. (1940) 309 U. S. 190, 84 L. Ed. 694, at p. 699:

“It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available.”

Finally, even if it be assumed for the sake of argument that appellant Cooper’s contentions are not entirely with-

out merit, it is most difficult to see wherein this ultra vires proposition urged by him has any bearing whatsoever upon the question of the right of the depositors to interest on their claims. Appellant does not deny the right of these depositors to recover the principal of the deposits which were made subsequent to 1929, and justice, logic and reason would seem to require that they are equally entitled to the legal interest which has accrued as damages incident to the forbearance in the payment of said deposits.

II.

Depositors Entitled to Interest.

When assets of an insolvent bank being liquidated under the Comptroller of the Currency prove sufficient to pay more than 100 per cent of the principal amount of depositors' claims, said depositors are entitled to interest on their claims after suspension until paid, computed at the statutory or legal rate of the jurisdiction in which the liquidation is conducted.

The right of depositors of an insolvent bank under the Comptroller of the Currency to receive interest on their claims after suspension, the principal amount of such claims having been paid in full, is established law of long standing. The leading case on this subject is *National Bank, etc., of N. Y. v. Mechanics' National Bank*, 94 U. S. 437, 24 L. Ed. 176, decided by the Supreme Court of the United States in 1877. This proposition was reaffirmed by the Supreme Court in 1887 in the important case of *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, where it held further that recourse could be had to the stockholders' liability for the payment of such interest, the Court stating as follows, 30 L. Ed. 876:

“Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As

the liability of the shareholder is for the contracts, debts, and engagements of the bank, we see no reason to deny to the creditor as against the shareholder the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statute. In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amounts then due as against the shareholders to the time of payment."

More recently this proposition has been reviewed and reaffirmed in *Stein v. Delano* (C. C. A., 3d, 1941) 121 F.(2d) 975, cert. den. 314 U. S. 655, reh. den. 314 U. S. 711, 2d pet. for reh. den. 314 U. S. 713, wherein many of the questions raised here by appellant Cooper were involved and vigorously urged. In that case, as recited in the Circuit Court opinion, there remained in the receiver's hands the sum of approximately \$750,000 after dividend payments aggregating 100 per cent of the principal amount of the depositors' claims. "The Comptroller now wishes to use part of these monies to pay interest to the depositors for the amounts which have been withheld from them during all the years the bank was closed and in liquidation." (121 F.(2d) 976). Notwithstanding the arguments of the stockholders, the court concluded that "the law is well settled and is with the Comptroller" (p. 978) and, as a result thereof, interest computed at the local statutory rate of 6 per cent per annum and aggregating 9.83 per cent in the total amount of \$514,807.59 was paid to the depositors in addition to the full principal amount of their claims.

In reaching this decision (which affirmed the holding of the District Court, 35 F. Supp. 260) the Appellate Court considered and disposed of various arguments such as the alleged hardship on the stockholders, the rule as to waiver

of interest, the claim against the allowance of interest at the legal rate, etc. Thus, the Court stated, 121 F.(2d) at p. 979, "The question, however, is not one of hardship, but of legal right." Likewise, on pages 979 and 980, it was held that "The rule as to waiver of interest is equally inapplicable. * * * 'In the insolvency cases there is no voluntary acceptance of principal because the creditor is precluded from rejecting the dividends and demanding payment of principal and interest in full'".

The refusal of the Supreme Court of the United States to review the above decision is entirely in accord with that Court's restatement of the established law in *Ticonic National Bank v. Sprague*, (1938) 303 U. S. 406, 82 L. Ed. 926, at page 929:

"As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand. Compare *Stewart v. Barnes*, 153 U. S. 456, 462, 38 L. Ed. 781, 784, 14 S. Ct. 849; *United States v. North Carolina*, 136 U. S. 211, 216, 34 L. Ed. 336, 338, 10 S. Ct. 920.

"The bank's obligation to pay interest as damages for the detention of the debt is not cut off by suspension of its business and receivership. The principle has been established, and claimants held entitled to such interest, in cases where the principal amount of each of the claims was paid in full from the assets of the bank (*National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176), including if necessary the double liability of the shareholders (*Richmond v. Irons*, 121 U. S. 27, 64, 30 L. Ed. 864, 876, 7 S. Ct. 788.)"

This Court has also declared in prior litigation instigated by appellant Cooper involving this receivership that the depositors of this bank are entitled to interest on their claims before any part of the assets may be turned over to stockholders. Witness the following language from the opinion in *United States Savings Bank v. Morgenthau*, 66 App. D. C. 234, 85 F. (2d) 811, 815 (cert. den. 299 U. S. 605, reh. den. 301 U. S. 713):

“It is plain, however, that no part of the assets of the Bank may be turned over by the receiver to the stockholders until after both the principal of the debts and the interest thereon are fully paid. In the present case the assets are not sufficient in value to pay both in full, and consequently the stockholders are not entitled to demand a restoration of the Bank and its property to them.”

That these cases represent the prevailing view throughout the United States is clearly reflected in a group of recent decisions which for convenience may be identified as the FDIC cases. Generally speaking, in this group of cases the facts are substantially as follows: A state bank with deposits insured by the Federal Deposit Insurance Corporation (FDIC) becomes unable to meet its obligations and is taken over by the state banking authorities. The FDIC promptly pays the claim of each depositor to the extent of its insurance liability and thereby, under the provisions of the FDIC Act, becomes subrogated to all rights of the depositor against the closed bank to the extent of such payment. It then presents its claim to the banking authority for the aggregate payments made to the depositors.

In the course of the ensuing liquidation of the bank's assets, distribution payments are made to the FDIC by the authority at such times as the funds become available, and it develops that a sufficient amount is ultimately realized on the assets to pay the full principal amount of the FDIC claim with an overplus remaining. The question is then presented whether the excess funds all belong to the shareholders or whether the FDIC as subrogee of the rights of the depositors is first entitled to interest as damages on its claim computed from the date of closing until the time of full payment of the principal amount thereof.

Suffice it to say that the right of the FDIC to receive said interest has been uniformly upheld in these cases; and it will be observed from an examination of the cases listed herein below that, in reaching this determination, the courts in question have been confronted with the various argu-

ments as to waiver, time of computation, rate of interest, etc., which appellant now advances in the case at bar. It would seem to follow that such decisions are not only persuasive but directly in point. Thus, see *Federal Deposit Insurance Corporation v. Falk* (1944) 245 Wis. 245, 14 N. W. (2d) 3; *Federal Deposit Insurance Corporation v. Farmers Bank of Newtown* (Kansas City Ct. of App., Missouri, 1944) 180 S. W. (2d) 532; *Federal Deposit Insurance Corporation v. Wilhoit* (1943) 297 Ky. 339, 180 S. W. (2d) 72; *Federal Deposit Insurance Corporation v. Leggett* (Ark. 1942) 164 S. W. (2d) 882; *Federal Deposit Insurance Corporation v. Citizens State Bank of Niangua* (C. C. A. 8th 1942) 130 F. (2d) 102.

(a) JURISDICTION OF THE COMPTROLLER OF THE CURRENCY.

Section 713 of the 1901 D. C. Code as amended (Sec. 26-101, 1940 D. C. Code) reads in part as follows:

“* * * and the Comptroller shall have power, when in his opinion it is necessary, to take possession of any such bank or company, for the reasons and in the manner and to the same extent as are provided in the laws of the United States with respect to national banks:
* * * .”

Under this statute and the applicable provisions of the National Bank Act, particularly Title 12, U. S. C. A. Secs. 191 and 192 (R. S. 5234) it has been held by this Court that the Comptroller of the Currency has jurisdiction to appoint a receiver of a state bank doing business in the District of Columbia and such receiver can enforce the liability of stockholders. See *Washington Loan and Trust Company v. Allman*, 63 App. D. C. 116, 70 F. (2d) 282, where the Court stated as follows, 70 F. (2d) 284:

“Congress, as we have seen, has imposed definite conditions on a banking institution chartered in one of the United States as a prerequisite of doing business in the District of Columbia. That a state has such power is unquestionable. *Pinney v. Nelson*, 183 U. S.

144, 22 S. Ct. 52, 46 L. Ed. 125. * * * When it established its banking house here and held itself out to the public as doing business here, it submitted itself to and became subject to the provisions of the act of Congress giving the Comptroller power, when in his opinion necessary, to take possession of the bank."

Also, it has here been held that the statutory language "to the same extent" means to the *full* extent. Thus, see *Harper v. Moran*, 64 App. D. C. 210, 76 F. (2d) 980 at page 982:

"In short, as we think, the provision in question is notice to every banking organization incorporated under the laws of one of the states that, in coming into the District of Columbia to do business, it submits itself to the supervision and control, both in operation and in insolvency, of the Comptroller to the same extent as if it were a national bank; * * *."

The action of the Comptroller in declaring The United States Savings Bank insolvent and appointing a receiver has already been upheld by this Court against the vigorous attack of appellant Cooper in the case of *United States Savings Bank v. Morgenthau*, 66 App. D. C. 234, 85 F. (2d) 811, (Cert. den. 299 U. S. 605, Reh. den. 301 U. S. 713). In this connection the following language from the opinion of the Court speaks for itself (85 F. (2d) 814):

"In the present case the Comptroller determined that the Bank was insolvent and appointed a receiver as aforesaid under the statute to wind up its affairs. The question of solvency or insolvency of the Bank depends upon the estimate of appraisal of the value of its securities. This is a matter of judgment and discretion. It is conceded by the appellants that prior to March 6, 1933, the "salability" and "liquidity" of the Bank's assets were such that, if the Bank were closed out at that time, its assets were not sufficient to pay its debts. The bank then was in the hands of a conservator, and it was properly denied the privilege of reopening at that time. It is claimed as a matter of fact by the appellants that after March

1934, the assets of the Bank had increased in value to an extent which rendered the Bank solvent. In February of the same year, however, the receiver had been appointed upon a finding and determination by the Comptroller that the Bank was insolvent. It is plain that the difference between the respective parties regarding the solvency or insolvency of the Bank rests upon an estimate of the value of the securities held and property owned by the Bank during this period. The Comptroller determined that the Bank was yet insolvent, whereas the president of the Bank contends that it had regained its solvency. This mere contradiction, standing alone, compels the court to accept the official determination of the Comptroller. * * *

Under the circumstances, it seems manifest without further citation of authority and without further argument that the liquidation of the United States Savings Bank under the Comptroller of the Currency and his appointed receiver is controlled by the applicable provisions of the National Bank Act and the court decisions pertinent thereto. It necessarily follows that the established law under the National Bank Act with reference to the rights of the depositors to interest on their claims after suspension is not only in point but is binding as regards the rights of the depositors in this bank.

(b) RATE OF INTEREST

It is contended by appellant Cooper that if any interest is payable it must be limited at most to savings account depositors at the rate of 3 per cent per annum with no interest at all for commercial depositors. In support of this proposition he relies primarily upon Sec. 28-2707 of the 1940 D. C. Code (Sec. 1184, 1901, D. C. Code) providing that a judgment in the District Court for a liquidated debt on which interest is payable by contract or by law or usage "shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid". Appellant Cooper interprets

this as meaning that, if a bank deposit bears interest at a specified rate by contract while the bank is a going concern, such rate becomes the measure of damages upon the bank's insolvency, notwithstanding the fact that such contract does not expressly provide for the payment of interest as damages at that or any other rate upon default; and he concludes from this premise that, if the contract between the parties calls for no interest prior to default, as in the case of commercial accounts, none would be payable thereafter, whether as damages for the default or otherwise.

The unsoundness of this proposition is manifest for obvious reasons. First, it disregards Section 28-2701 of the 1940 D. C. Code (Sec. 1178, 1901 D. C. Code as amended) which fixes the statutory or legal rate of interest upon the loan or forbearance of money at 6 per cent per annum, in the absence of "*express contract as to such rate*" (Italics supplied); secondly, it assumes, contrary to fact, that the contract between the bank and the depositors regarding the payment of interest specifies the rate of interest payable as damages in case of default or forbearance in the payment of the depositors' claims; and thirdly, it would necessarily violate the ratable distribution provisions of the National Bank Act, 12 U. S. C. A. Sec. 194.

(1) Sec. 28-2701 of the 1940 D. C. Code reads in part as follows:

"The rate of interest in the District upon the loan or forbearance of any money, goods, or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars for one year, and at that rate for a greater or less sum or for a longer or shorter time: * * *"

Section 28-2707 relied on by appellant simply provides that, in an action upon a liquidated debt on which interest is due and payable, whether by contract or by law or usage, the judgment shall include interest on said principal debt from the time when it was due and payable, and that, if there is

a contract rate applicable after maturity under the terms of the contract, then the interest included in the judgment shall be at such rate, it being understood, of course, that otherwise said interest will be at the statutory rate. By this interpretation of the language of Section 28-2707, that section becomes entirely consistent in all respects with the specific provision in Section 28-2701 stating that the rate of interest to be allowed in judgments and decrees in the absence of *express* contract as to *such* rate shall be 6 per cent per annum (*Italics supplied*).

Clearly the suspension of the bank in 1933 constituted an actual and unqualified "forbearance" of the claims of all depositors of the bank. It is equally clear, as will be more fully disclosed below, that there was no contract between the bank and any of the depositors fixing the rate of interest to be allowed in the event of such forbearance. Under the circumstances the reasoning of this Court in the case of *Richards v. Bippus*, 18 App. D. C. 293, although decided just prior to the enactment of the above-noted code provision, is persuasive if not controlling on this question. Witness the language of the court p. 302:

"The practice has always been in this District to direct the jury to assess interest, at the contract rate, to the maturity of the demand, where it is not expressly stipulated to run until paid; and thereafter at the rate established by law. This practice has been expressly affirmed by the Supreme Court of the United States. *Holden v. Trust Co.*, 100 U. S. 72. * * *"

The case of *Holden v. Freedman's Savings and Trust Company*, 100 U. S. 72, 25 L. Ed. 567, cited in the above excerpt, was also a District of Columbia case. The Supreme Court there stated as follows (25 L. Ed. 568):

"The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate.

* * * * *

“Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to everything beyond that, it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intendment cannot be inferred.”

It is apparent, of course, that the argument here need not have been carried to this extent for the following reason. In case of insolvent banks being liquidated by the Comptroller of the Currency under the National Bank Act it is the established law, as has already been noted, that all the depositors and creditors are entitled to interest upon their claims at the statutory rate of the jurisdiction in which the liquidation is being conducted. That being the case, it is here necessary to inquire only as to the statutory rate in the District of Columbia, and Section 28-2701 provides the answer—6 per cent per annum in the absence of express agreement to the contrary.

(2) The only contract covering the question of interest to depositors is the one admitted by the pleadings and set forth in the depositor's pass book appended to the receiver's Reply as Exhibit “B” (Joint App. p. 24). The agreement of the parties as evidenced therein extends no further than to the time fixed for the payment of the deposits. As to anything beyond that it is silent. No stipulation can be found fixing the rate of interest in the event of default or forbearance in the payment of said deposits; and it is likewise apparent that the various provisions of said contract regarding the allowance and payment of interest are all such as to contemplate the existence only of a solvent and going banking concern. There is not a single provision which states, even by inference, that the 3 per cent interest

rate on savings accounts should continue or be applicable after default or forbearance by the bank, and, in the language of the statute, "in the absence of express contract as to such rate of interest", the rate shall be 6 per cent per annum.

It follows that appellant's novel contention that the demand depositors are not entitled to any interest under Section 28-2701 because their contract with the bank called for no interest prior to suspension is equally fallacious. The agreement with these depositors contains no suggestion that in case of default by reason of suspension or otherwise their measure of damages or, in other words, their rate of interest upon the forbearance, shall be nothing.

It will also be noted that even the contract with the savings depositors is beset with qualifications and conditions which would make the contract rate inapplicable as a measure of damages. Thus, each savings account had to have a minimum balance of \$5.00 before any interest would be allowed (Joint App. p. 25) and no interest was payable on an account regardless of size unless it was continued with the bank for at least two calendar months prior to an interest period (Ibid.). Furthermore, the bank reserved the right to close out an account at any time upon one month's notice (Joint App. p. 26), thereby terminating the contract and in effect putting the deposit on a demand basis in case the depositor failed to withdraw his funds. It would seem to follow that the insolvency and suspension of the bank would be equally, if not more, effective as regards terminating the contractual arrangement that existed with these depositors prior to suspension. *People v. Merchants' Trust Company*, 187 N. Y. 293, 79 N. E. 1004, 1006.

(3) In any event, the requirement that the distribution of the bank's assets to the depositors and creditors must be ratable is mandatory and controlling. Thus the National Bank Act expressly provides as follows, 12 U. S. C. A. Sec. 194:

“From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. Sec. 5236.)”

The Supreme Court of the United States long ago held that this means what it says. *First National Bank of Selma v. Colby*, 21 Wall. 609, 22 L. Ed. 687. And in 1941 the Supreme Court had occasion to restate this proposition in the case of *American Surety Company v. Bethlehem National Bank*, 314 U. S. 314, 86 L. Ed. 241, at page 242, where it was held that “a ‘ratable’ distribution requires that dividends be declared proportionately upon the amount of all claims as they stand on the date of the insolvency. This is settled law.” Further citation of authority seems unnecessary.

This requirement as to ratability clearly applies to the payment of interest upon the claims of depositors after suspension. Appellant’s theory contemplates one rate for the savings depositors and a different rate or perhaps no interest at all for the demand depositors—a “non-ratable” distribution on its face, utterly disregarding the established principle that the right of all depositors to share ratably in the assets of the bank becomes fixed at the time of suspension. *Fash v. First National Bank of Alva, Okl.* (C. C. A. 10th 1937) 89 F. (2d) 110, 112. It is for that reason that Judge McColloch in *Elliott v. First Inland National Bank of Pendleton, Oregon*, 32 F. Supp. 839, expressly stated that interest on the time and savings deposits should be com-

puted to the date of closing at the contract rate and that thereafter such deposits, together with the demand deposits, should bear interest at the local statutory rate, ratability in distribution being thus attained. It is inconceivable that this mandatory rule of ratability which is controlling as to payment of principal and for all other purposes of the receivership is to be disregarded in computing interest, the depositors' right to which has been designated by the Supreme Court of the United States as "an incident to the right to recover an unexpended balance in a deposit" (*Ticonic National Bank v. Sprague*, 303 U. S. 406, 82 L. Ed. 926, 929).

A similar conclusion was reached by the New York Court of Appeals many years ago in the case of *People v. Merchants' Trust Co.* (1907), 187 N. Y. 293, 79 N. E. 1004, at p. 1006, where the court reasoned as follows:

"* * * After the receiver had taken possession of the assets of the company * * * the corporation became powerless to carry out its contracts with the depositors to repay their money to them upon demand. The depositors thereby had their right of withdrawal and payment taken from them. The company, owing to its inability to pay, became chargeable with a breach of its contracts, thus terminating its right under the existing contracts and investing its depositors with all the rights given by law to persons whose contracts have been broken. To continue the interest at the contract rate would be manifestly unjust to the creditors, for the rates allowed under the contracts varied, as we have seen, from 2 to 4 per cent, and it would, therefore, favor one class at the expense of the other. We think, therefore, that when the contracts with creditors were broken by the defendant becoming insolvent and the appointment of a receiver, so that it was unable to perform its agreements, the legal rate of interest became the rate to which all the creditors were thereafter entitled, and it should be paid by the receivers if the assets are sufficient."

It should here be noted that this question as to the rate of interest under D. C. law to be allowed the depositors of

the bank after suspension was previously raised by appellant Cooper in his Cross-Complaint in the case of *McKinley High School Bank, et al v. Delano, et al*, Civil Action No. 17348 in the District Court—a suit by certain depositors of the bank attacking the plan of settlement which was the subject of this Court's decision of May 20, 1943, *Cooper and Fraser, et al v. Goldsmith, et al* (Nos. 8369 and 8370) 77 U. S. App. D. C. 392, 135 F. (2d) 949. The receiver, appellee herein, and Preston Delano, the Comptroller of the Currency, co-defendants in said *McKinley* case, were named as cross-defendants by appellant Cooper and in due course they moved to dismiss the Cross-Complaint. In sustaining the motion, Mr. Justice Bailey wrote an opinion filed therein December 8, 1943, which reads in part as follows:

“It may be added that the rate of interest to which the depositors are entitled is governed by Sec. 28-2701 of the D. C. Code. See also *Richards v. Bippus*, 18 App. D. C. 293. In view of this it would seem that the fact that the bank had been paying 3 per cent interest on some of the deposits is immaterial so far as the question of the rate of interest after the closing of the bank.”

Appellant Cooper did not see fit to appeal from the final ruling and order dismissing his Cross-Complaint in said *McKinley* case and consequently it constitutes a valid, outstanding and binding decision upon the issues there determined as between appellant and appellee. For the court's information, the complete opinion of Mr. Justice Bailey in that case is appended to this brief as Appendix “A” and made a part hereof by this reference.

Finally, as a matter of long and well established administrative practice, it should be noted (paragraph 15 of the receiver's Reply, Joint App. pp. 19-20), as disclosed by the annual reports of the Comptroller of the Currency, of which this court will take judicial notice (*Hardee v. Washington Loan and Trust Co.*, 67 App. D. C. 241, 91 F. (2d) 314, 315), that such interest has been paid, since 1876, on the claims of depositors after suspension in more than 400 bank receiver-

ships under the National Bank Act, and that the following such interest payments computed on the basis of the local statutory rate, 6 per cent per annum, have been made by the Comptroller in the case of the following insolvent banks finally liquidated in the District of Columbia since the bank moratorium of March 6, 1933:

Bank	Total % of Interest Paid	Date Interest Paid	Law Under Which Bank Organized
Chevy Chase Savings Bank	8%	Nov. 1936	Arizona
District National Bank	2.88%	Sept. 1942	Natl. Bank Act
Northeast Savings Bank	5.16%	June 1940	Arizona
Seventh Street Savings Bank	6.8%	Apr. 1942	West Virginia
Washington Savings Bank	10.24%	Jan. 1939	Arizona

(c) INTEREST DURING CONSERVATORSHIP.

Appellant Cooper relies upon the case of *Richman v. First Methodist Episcopal Church* (C. C. A. 3rd, 1935), 76 F. (2d) 344, as authority for the proposition that, under no circumstances, are the depositors of an insolvent bank entitled to interest on their claims during the period of the conservatorship. As a matter of fact, the question which is now before this Court in the case at bar was not, and could not have been, before the Court in the *Richman* case for the following reasons: (1) the total dividends paid by the receivership of the Collingswood National Bank amounted only to 86.25 per cent (Comptroller's annual report to Congress, January 3, 1940, pages 338, 343) and therefore the question of interest to depositors was not presented, and (2) the controversy there involved a secured claim, not the claims of general creditors, and the actual holding was that, in a case where no interest would be payable to depositors during the receivership itself, it would be error to allow interest during the conservatorship, the stated reason being that, under the Bank Conservation Act, the rights of all parties under a conservator are the same as if a receiver had been appointed.

It would necessarily follow that, in a case where interest is allowable during the receivership, it would likewise be

allowable during the conservatorship. In this connection counsel are advised by the Comptroller of the Currency that, in no instance of an insolvent bank where there has remained a balance after the payment of 100 per cent of principal, has the Comptroller failed to allow interest on the claims of depositors during the conservatorship, and that, as of December 31, 1943, such interest has been paid to the depositors of 197 banks that were once in conservatorship.

The computation of interest in the present case begins as of March 6, 1933, the date of the formal closing of the bank under the President's Proclamation. This is supported by numerous decisions holding that the rights of the parties are fixed as of the date of closing and are the same under the conservator as though a receiver had been appointed. Thus see *Downey v. City of Yonkers*, 23 F. Supp. 1018 (Aff'd. 106 F. (2d) 69; aff'd. 309 U. S. 590, 84 L. Ed. 964; reh. den. 310 U. S. 656, 84 L. Ed. 1420) where Judge Knight stated as follows on p. 1022 of 23 F. Supp:

"It seems to me under the circumstances in the case that a presumption of insolvency as of March 6, 1933, arises and continues to the time of the appointment of a receiver, since the bank never opened its doors for the transaction of regular business after March 6, 1933. The conservator was appointed less than two weeks from the date of closing, and a conservator or conservators continued in possession until the appointment of a receiver.

* * * * *

"Section 203, 12 U. S. C., 12 U. S. C. A. Sec. 203, in part, provides: 'During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this sub-chapter, be the same as if a receiver had been appointed therefor.' It follows therefore that the rights of creditors relate back to the date of the closing of the bank pursuant to the President's Proclamation of March 6, 1933."

See also *Davis Trust Company v. Hardee*, 66 App. D. C. 168, 85 F. (2d) 571; *Hardee v. Washington Loan and Trust Co.*, 67 App. D. C. 241, 91 F. (2d) 314, and *Bryce v. National City Bank of New Rochelle*, 17 F. Supp. 792.

Likewise in point is the opinion of Mr. Justice Letts of the District Court in the case of *Daly Bros., Inc. v. Hickman*, Eq. No. 55,568, 61 W.L.R. 802, which reads in part as follows:

“* * * If insolvency existed on March 14, 1933, when the conservator was appointed it may reasonably be said that the condition of insolvency existed on March 6, 1933, when the bank was closed and its transactions interrupted. It was not the appointment of the conservator that fixed the rights of creditors but rather the condition of insolvency which, for the purpose of this discussion, must be deemed to have existed when the bank was closed on March 6, 1933.”

See also *Willing v. Jensen*, 17 F. Supp. 596, p. 597, where the court stated:

“* * * Under that act it was the duty of the conservator appointed by the Comptroller of the Currency to take possession of the books, records, and assets of the bank and to take such action as might be necessary to conserve its assets pending further disposition of its business as provided by law. He had under the act all the rights, powers, and privileges possessed by a receiver of an insolvent national bank, and during the time he remained in possession the rights of all parties with respect to the bank were, subject to certain exceptions contained in the act and not here material, the same as if a receiver had been appointed therefor.”

As regards the immediate question it will be observed from the opinion of the Federal District Court in Oregon in the case of *Elliott v. First Inland National Bank of Pendleton, Oregon*, *supra*, 32 F. Supp. 839, that the allowance and computation of interest paid to the depositors in that case actually included the period of conservatorship which, as noted in the opinion, covered the period from

March 22, 1933 until February 1, 1934 when a receiver was appointed. "Whether any interest should be allowed prior to the appointment of the receiver is one of the main questions. The rule seems to be, both by long administrative interpretation and judicial decision, that where a bank suspends and does not resume normal business, interest runs from the date of suspension."

(d) WEST VIRGINIA LAW, WAIVER OF INTEREST, EQUITABLE CONSIDERATIONS, ETC.

The argument has been advanced that under the law of West Virginia—the state of incorporation—no interest would be allowable to the depositors. Even if this were correct it would not be controlling because, as has already been noted (p. 19 of this brief), when this bank came into the District of Columbia to conduct its banking business it did so subject to the supervision and control of the Comptroller of the Currency and the applicable provisions of the National Bank Act. Notwithstanding that fact, the contention itself is without merit for the simple reason that the West Virginia Supreme Court has already adjudicated this question in the important case of *Hoffman v. Unger* (W. Va., 1943), 24 S. E. (2d) 911, involving a West Virginia bank that became insolvent in 1931, wherein the law there was declared to be in accord with that established in other jurisdictions. Thus, the court held that "interest upon deposits is a part of the liabilities for which the double liability assessment of a stockholder of a closed bank must stand responsible" (24 S. E. (2d) 914) and that the surplus remaining after the payment of 100% of the depositors' claims should be awarded to the depositors as interest on said claims.

Appellant Cooper also contends that, since the depositors have admittedly received 100% of the principal amount of their claims, they have now waived, under the rule of *Kimball v. Williams*, (1910) 36 App. D. C. 43, any right to interest which they might have had. An examination

of that case clearly discloses that it is inapplicable as applied to the present controversy. Furthermore, this same contention was made and rejected in *Stein v. Delano*, supra, where the Circuit Court of Appeals stated as follows, 121 F. (2d) 979:

“The rule as to waiver of interest is equally inapplicable. It does not apply in receiverships for the reason that during the administration nothing could have been accomplished by a formal demand for interest. Until the principal of all the claims are paid it can not be known whether the estate would have enough remaining assets to make payment upon the interest. Therefore there can be no waiver of the claim for interest. * * *”

The same conclusion was reached by the majority of the court in the above-noted West Virginia case of *Hoffman v. Unger*, 24 S. E. (2d) 911 at page 914.

Another contention urged by appellant Cooper is founded on the opinion of the Supreme Court of the United States in *Board of County Commissioners of the County of Jackson v. United States* (1939) 308 U. S. 343, 84 L. Ed. 313, wherein it was stated that “interest is not recoverable according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.” In that case there was a treaty between the United States and the Indian tribe under which the lands held in trust for the Indians were exempt from taxes. Under a later indefinite extension of the trust periods, the Interior Department cancelled the outstanding trust patents and issued fee simple patents. Thereupon, Jackson County, Kansas, where the lands were located, began to subject them to regular property taxes. Nine years later, Congress authorized cancellation of the fee simple patents in those cases where the Indians had objected, and, when this authorization was finally acted upon by the Interior Department after a further period of nearly eight years, the effect was to reinstate the tax exemption. The following

language of the court, 84 L. Ed. 318, discloses the considerations which prompted the decision in that case:

“Jackson County in all innocence acted in reliance on a fee patent given under the hand of the President of the United States. Even after Congress in 1927 authorized the Secretary of the Interior to cancel such a patent, it was not until 1935 that such cancellation was made. Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. * * * Whatever may be her unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers.”

It is immediately apparent that the Jackson County case is in no sense comparable to the case at bar where the question of the right of depositors to interest is an established proposition of long standing founded on statutory and judicial interpretation.

Mention should also be made of the case of *American Tobacco Co. v. South Carolina National Bank* (1936), 15 F. Supp. 215, which is cited as holding that interest at a lesser rate than 6 per cent—in that case, 2 per cent—was all that should be allowed on a claim against an “insolvent” bank. Suffice it to say that the bank in that case was a reorganized and therefore solvent bank, and thus the present question as to the right of depositors to receive interest on their claims after insolvency was not involved nor considered.

Finally, under the heading of “Equity”, appellant Cooper refers to the bank’s alleged surplus of “around \$400,000”. However, the certified photostatic copy of the report of the condition of this bank as of December 31, 1932 (Exhibit II-b to appellee’s Motion for Summary Judgment, photostatic Transcript of Record, p. 60), signed and sworn to by Mr. Cooper and filed with the Treasury Department pursuant to law, lists a book surplus of only \$150,000, undivided profits of \$33,638.54 and reserves of \$24,480.24. Against

this *book* surplus the bank examiner, in his last report of the condition of this bank completed October 17, 1932 (See appellee's affidavit, Exhibit I to said Motion, Joint App. p. 36), classifies certain of the bank's assets as "slow", \$307,457.68; "doubtful (loss probable, but not estimated)" \$114,814.28; and "estimated losses", \$73,040.04. Appellant Cooper is not only familiar with this report but has admitted of record in his sworn Bill of Complaint in the now familiar case of *United States Savings Bank v. Morgenthau* (Equity No. 57,344 in the District Court, No. 6605 in this Court) that at the time of the bank moratorium the assets were not sufficient to pay the debts (Transcript of Record, No. 6605 in this Court, p. 3).

The appellant's claim of alleged equities in favor of the shareholders of this bank is not borne out by the facts, and a comparison with the case of *Elliott v. First Inland National Bank of Pendleton, Oregon*, 32 F. Supp. 839, shows conclusively why the argument is without merit. Thus, there was entered in that case a Pre-Trial Order containing stipulations between the parties which disclosed the following facts: The First Inland Bank had been organized in October 1931, only a year prior to its suspension, to take over the affairs of two predecessor banks unable to continue in business and was capitalized with \$500,000 raised by the shareholders who were then business men of the community, activated primarily by a sense of civic duty. Thereafter, upon suspension, subsequent liquidation and payment of 100 per cent principal to the depositors there remained an overplus of \$460,000 of which nearly \$400,000 represented collections from a compulsory assessment levied by the Comptroller of the Currency. (Pertinent excerpts from said Pre-Trial Order are appended to this brief as Appendix "B", and a complete copy thereof is in the possession of counsel for appellee and will gladly be submitted to the Court for inspection if desired).

Pursuant to the court's decision there was paid to the depositors, before any of the overplus could be returned to

the shareholders, a full interest dividend aggregating 13 per cent of the claims of depositors (Annual Report of Comptroller of Currency, 1940, pp. 360, 365) computed at the local statutory rate of 6 per cent per annum and amounting to \$336,698.53. It is thus apparent that in the short period of that bank's organization, existence and liquidation the shareholders paid in a total of \$900,000, most of which was ultimately lost to them. While fully aware of the considerations raised by these facts, Judge McColloch nevertheless ruled as follows, 32 F. Supp. 839:

"Equity, unfettered, might arrive at a different result, in view of the greatly reduced interest rates of current times, but, as said, the question is controlled by statute and judicial interpretation of long standing."

In the case at bar, notwithstanding the admitted payment to the stockholders of abnormally large dividends (as high as 26½ per cent to 40 per cent annually) for many years immediately preceding the closing of the United States Savings Bank on March 6, 1933, appellant Cooper and his fellow stockholders so operated this bank through their agents, the officers and directors, that on February 28, 1933 (less than two months after the payment of the last such dividend and just prior to said closing date) the directors admitted of record the bank's inability to pay deposits due on demand—an act of insolvency—by passing a unanimous resolution restricting withdrawals (Joint App. pp. 23-24). From that moment on, "the bank was not open, but only its front door." *Kullman & Company v. Woolley* (C. C. A. 5, 1936) 83 F. (2d) 129, 133. See also *Willing v. Eveloff* (C. C. A. 3rd, 1938) 94 F. (2d) 344, 346, where the Court stated as follows:

"The test is, has an act of insolvency been committed? Failure to pay depositors and creditors in the ordinary and regular course of business is an act of insolvency."

After the closing on March 6, 1933, this bank having failed to qualify for a license to reopen under the Bank

Conservation Act and the Comptroller having properly refused to approve an inequitable plan of reorganization, under which the depositors rather than the stockholders would have been required to recapitalize the bank (*Cooper v. Woodin*, following), appellant Cooper, the owner of 56 per cent of the bank's stock, instituted a series of lawsuits in which his contentions, all of which he would reassert here, have been uniformly rejected by the District Court, by this Court and by the Supreme Court of the United States. Thus, see *Cooper v. Woodin*, 63 App. D. C. 311, 72 F. (2d) 179; *United States Savings Bank v. Morgenthau*, 66 App. D. C. 234, 85 F. (2d) 811, cert. den. 299 U. S. 605, reh. den. 301 U. S. 713; and *Cooper v. O'Connor*, 69 App. D. C. 108, 99 F. (2d) 143. (It should here be noted that appellant Cooper has made at least five different attempts to review or set aside the decision in the above-noted *Morgenthau* case—No. 6605 in this Court—all of which have been denied on the following dates, respectively: September 7, 1937, April 16, 1938, July 15, 1942, October 21, 1942, April 15, 1943.)

The expense of defending most of these proceedings has been a necessary charge against the depositors' funds and has caused them a loss of many thousands of dollars in addition to prolonging the receivership and delaying the payment to the depositors of the amounts legally due them. Even if equity were "unfettered" an examination of the record in these Cooper suits establishes beyond question that the equities here are actually with the bank's depositors, not with the stockholders.

III.

Charges and Claims of Appellant.

Appellant Cooper's unsupported charges of fraud and wrongful acts by the Comptroller of the Currency in the exercise of his exclusive discretion regarding the closing and liquidation of this bank fail to raise an issue as to any material facts and cover matters which have become res judicata as against said appellant.

A substantial part of appellant Cooper's Substituted Counterclaim (Joint App. pp. 3-11) is made up of various charges against the former Comptroller of the Currency, the general effect of which is (1) that the bank was at all times solvent and had sufficient assets to pay all claims, with interest, at the time it was closed; (2) that the Comptroller acted wrongfully and arbitrarily in refusing to reopen this bank under the plan submitted to him by appellant Cooper; (3) that the appointment of the receiver and the subsequent liquidation of the assets were ordered by the Comptroller because of his animus toward appellant and for the purpose of wrecking the bank and ruining him; (4) that to accomplish these ends the Comptroller refused to defer payment of a portion of the depositors' claims, refused to trustee the assets, insisted that the stockholders put up new cash as a condition for reopening the bank and included an illegal interest computation of 6 per cent per annum as part of the claims against the bank, while at the same time permitting other banks to defer payment of depositors' claims, trustee assets and pay to their depositors interest as low as 2 per cent; (5) that the Comptroller acting through his appointed receiver wrongfully delayed liquidation and distribution of assets, levied an assessment against the stockholders and filed this suit to enforce the assessment, although the assets were sufficient to pay the depositors in full; and (6) that the Comptroller and the receiver incurred unnecessary expenses in connection with this litigation and otherwise dissipated the assets in order to make the bank appear insol-

vent, all with fraudulent and wrongful intent (Appellant's Substituted Counterclaim, particularly paragraphs 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, and 25, Joint App. pp. 6-9.)

The recital of these charges focuses attention upon the decision of this Court in the case of *Lucking v. Delano*, 74 App. D. C. 134, 122 F. (2d) 21, wherein it was held affirmatively that unsupported conclusions alleging wrongful, negligent and improper acts by the Comptroller of the Currency fail to state a cause of action. Witness the following pertinent language, 122 F. (2d) 23:

“* * * In reply to these pleadings and their comprehensive—not to say remarkable—proposals, the Comptroller moved to dismiss for reasons which may be summarized as follows: (1) The complaint as amended and supplemented asks for relief concerning matters which are exclusively within the discretion of the Comptroller; (2) no facts are alleged which would justify the court in setting aside the official acts of the Comptroller; (3) the question whether the Comptroller should approve a plan to terminate the receivership is one which calls for the exercise of discretion by the Comptroller; (4) no sufficient showing appears from the allegations of the complaint to call for an accounting by the Comptroller; (5) the depositors have not yet received payment of their claims in full; (6) no allegations of the complaint show that the Comptroller, or his predecessor, have been guilty of bad faith or personal fraud in the administration of the receivership.

“In our view the correctness of the reasons assigned by the Comptroller is apparent, and the lower court properly granted the motion to dismiss. * * *”

Again on page 27 this Court stated:

“* * * In the present case no well pleaded facts appear in the complaint to show that the actions of the Comptroller or Receiver were arbitrary or done in bad faith. To the contrary, the allegations of the complaint consist of (1) conclusions of law; (2) fallacious arguments on questions of law, which would be improper in a

pleading even if they were not fallacious; and (3) allegations *upon information*, concerning collateral and immaterial issues. * * *

In the important case of *Adams v. Nagle* (1938), 303 U. S. 532, 82 L. Ed. 999, which involved a stockholders' suit to enjoin the enforcement of an assessment and where the alleged failure of the Comptroller to collect certain claims of the bank was attacked as erroneous and improper, the Supreme Court of the United States stated as follows, 82 L. Ed. 1005:

"It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. It would be equally intolerable if stockholders as a class could call upon a court to review the Comptroller's exercise of his discretion. For a court to entertain a suit for this purpose would be to render nugatory the functions Congress has confided in the Comptroller. It has often been decided this may not be done."

Frequent reference has already been made to the decision of this Court in the case of *United States Savings Bank v. Morgenthau*, 66 App. D. C. 234, 85 F. (2d) 811, upholding the action of the Comptroller in declaring this bank insolvent and appointing a receiver. Again, however, the language of the late Chief Justice Martin is pertinent and controlling, 85 F. (2d) 814:

"* * * It has been held by a long array of authorities that, where the Comptroller of the Currency has held a bank to be insolvent and has appointed a receiver for it, the court will not substitute its judgment for the judgment of the Comptroller, unless it appears by convincing proof that the Comptroller's action is plainly arbitrary, and made in bad faith."

While it is obvious that there is no merit to any of the reckless charges which appellant Cooper has made against

almost every public officer who has performed duties incident to the closing and liquidation of this bank, it is equally obvious, as a matter of law, that the depositors are not concerned with such matters. They did not select the liquidators; they were thrust upon them by statute. That the receiver can collect the assets, including a stock assessment, and distribute the proceeds pursuant to law without reference to such charges seems clear from the following decisions.

Thus in *Barbour v. Thomas*, 7 F. Supp. 271, aff'd. 86 F. (2d) 510, cert. den. 300 U. S. 670, a leading stock assessment case wherein the shareholders, by way of defense, complained against the closing of the bank and against certain acts of the conservator incident to liquidation, the District Court used the following language, p. 276:

"The creditors are in no way responsible for the alleged shrinkage of assets by the allegedly illegal holidays, or by the acts of the conservator. * * * It would be a novel proposition if a bank stockholder could defeat the creditors by showing the assets were dissipated through the acts of the officers appointed to administer them."

In affirming this decision the Sixth Circuit Court of Appeals stated as follows on p. 516 of 86 F. (2d):

"* * * but apart from this, the liability of a stockholder in a national bank does not depend upon a judicial determination, whether the banking holidays were well advised, whether the conservator discreetly managed the assets, or whether crucial and unforeseen circumstances led to insolvency."

In *Smith v. Witherow* (C. C. A. 3d, 1939) 102 F. (2d) 638, another stock assessment case, the court stated as follows on p. 642:

"It is true that the Comptroller's action in appointing a conservator in the present case did not succeed in effecting the rehabilitation of the Bank, but on the con-

trary resulted in further loss. This was unfortunate but is not available to the defendants as a defense to the present action. Even at their best, men are subject to the frailties of their human nature."

The New York decisions are in point because of the similarity between its banking law and the National Bank Act. In *Broderick, Supt. of Banks, v. Betco Corp.* (1933), 267 N. Y. S. 139, 145, it was said:

"It follows that it is no defense to an action to recover an assessment that the liquidation may have been conducted in an improper manner. See also, *Broderick v. Adamson*, supra, page 373 of 148 Misc., 265 N. Y. S. 804. Whatever rights, if any, the defendant may possess by reason of the alleged wrongful conduct on the part of the superintendent in connection with the liquidation of the Bank's affairs, it is clear that the defendant's liability to pay the assessment is not discharged thereby."

In the case at bar where there is no substantiation of appellant's unfounded charges against the Comptroller it must be even more apparent that the basic question as to the ownership of the remaining assets and the right of the depositors to interest on their claims can not be controlled or even affected by appellant's argument. The claims of the depositors are founded on established legal rights. If, in fact, there is any basis for these charges, appellant and his fellow stockholders may or may not have a claim for damages against the United States. Certainly, until the depositors have been paid in full, the shareholders are not, under any theory, entitled to the bank's assets to which the right of said depositors has attached.

In any event, all of these contentions raised by appellant Cooper have become *res judicata* as against him by reason of the decisions of the District Court and this Court in the cases of *Cooper v. Woodin* (Equity No. 56,143), 63 App. D. C. 311, 72 F. (2d) 179; *United States Savings Bank v. Morgenthau* (Equity No. 57,344), 66 App. D. C. 234, 85 F. (2d) 811; and *Cooper v. O'Connor* (At Law No. 88,516),

69 App. D. C. 108, 99 F. (2d) 143; and the decision of the District Court in *McKinley High School Bank v. Delano*, Civil Action No. 17,348 in said Court.

Appellant in his Substituted Counterclaim (Joint App. p. 9) expressly admits that certain of these alleged acts were included in the *Cooper v. Woodin* and *United States Savings Bank v. Morgenthau* cases, *supra*, and an examination of those cases, together with *Cooper v. O'Connor*, *supra*, clearly discloses that the decisions therein are binding as to substantially all of the foregoing matters. Thus, the *Woodin* case specifically covers the various charges regarding the formation of the Hamilton National Bank and the refusal of the Comptroller to approve appellant's plan for reopening this bank, together with his insistence that the deficiency in assets be made up by the stockholders.

As regards the *Morgenthau* case, the Bill of Complaint there, like the Substituted Counterclaim here, asserts the solvency of the bank and charges the former Comptroller with arbitrary, wanton and malicious acts in declaring the bank insolvent and appointing a receiver for the purpose of destroying the bank and ruining appellant (see Transcript of Record No. 6605 in this Court, p. 7, and the recitals in the opinion of this Court in said case, 85 F. (2d) 811 at p. 813). Similar recitals are to be found in *Cooper v. O'Connor*, *supra*, and, accordingly, it is manifest that said cases are controlling here as to the matters determined therein.

The decision of Mr. Justice Bailey in dismissing appellant Cooper's Cross-Complaint in the *McKinley High School Bank* case, *supra*, Civil Action No. 17,348 (see Appendix "A" to this brief) is particularly important here because these same charges and allegations were likewise asserted almost verbatim in that case. Thus, the following paragraphs from said Cross-Complaint on file in the District Court may properly be noted:

"6a. That at the time the Comptroller was demanding \$150,000 cash for this Bank to open he was approv-

ing the sale of preferred stock and debenture notes by 2000 other banks to the total amount of \$575 million Dollars." (cf. par. 12, Substituted Counterclaim, Joint App. p. 6.)

"8a. That in some instances the Comptroller allowed banks to open by agreeing to pay only 35 or 40 percent cash to their depositors and selling stock or debentures, but demanded \$150,000 new money to open this Savings Bank." (cf. par. 13, Substituted Counterclaim, Joint App. p. 6.)

"11a. That the former Comptroller refused to obey the suggestion of his superior, the Secretary of the Treasury, to bring in a plan to open the bank on account of his personal animus towards this defendant, announcing that fact openly to the Secretary of the Treasury in the presence of Defendant and other persons." (cf. par. 20, Substituted Counterclaim, Joint App. p. 8.)

"15a. That his Receiver, Carter B. Keene, his alter ego, declared the Bank perfectly solvent, after an examination and in emphatic language refused to sue the stockholders but was finally 'permitted' to resign, when Frederick J. Young, was appointed Receiver, and soon thereafter brought suit against the stockholders, when his own records showed conclusively that he had much more cash and other assets on hand than was needed to pay all proven claims, including an alleged but unlawful interest charge of \$204,000. This suit was instituted in 1937, its purpose being to harass and annoy this Defendant, since which time more than \$50,000 has been dissipated and wasted of the assets of said Bank." (cf. par. 17, Substituted Counterclaim, Joint App. p. 7.)

"16a. That Mr. George P. Barse, counsel, as aforesaid, had instructions from the former Comptroller to veto any plan that would open the bank, the Comptroller refusing to trust his regular authorized Deputy Mr. Gibbs Lyons in the matter." (cf. par. 16, Substituted Counterclaim, Joint App. p. 7.)

"17a. That the said former Comptroller had a regular system of allowing banks to Trustee their assets when he did not wish to assess the stockholders but refusing when he wished to assess them, as in this case." (cf. par. 14, Substituted Counterclaim, Joint App. p. 6.)

“20a. That he allowed other Banks to pay 2 and 3 per cent interest to depositors while he insisted upon 6% payment by this bank.” (cf. par. 15, Substituted Counterclaim, Joint App. p. 6.)

“22a. That about \$40,000 has been lost on account of the negligence and failure of the former Comptroller or his Receiver to collect interest due, and to pay taxes when due, * * *” (cf. par. 18, Substituted Counterclaim, Joint App. p. 7.)

From the foregoing it is immediately and conclusively apparent that appellant Cooper has already had his day in court. Surely there must be an end to his alleged right to relitigate these unfounded charges which have previously been determined against him.

CONCLUSION.

While this brief is perhaps longer than is ordinarily desirable, counsel for appellee deemed it necessary to consider carefully all matters raised by appellant Cooper, including those already disposed of by prior litigation and those clearly immaterial to the real issue in this suit—the ownership of the remaining cash in the hands of the receiver. Accordingly, in responding to these matters, it has become apparent that the various claims, charges and contentions asserted by appellant in his Substituted Counterclaim, his Motion for Summary Judgment and his argument to this Court, in an effort to distinguish this case from the overwhelming weight of authority, are wholly without merit and were properly rejected by the District Court.

It follows, by way of summary, that all of the depositors and creditors of the United States Savings Bank, whether their accounts were demand, savings or time accounts prior to suspension, are entitled to interest as damages on their claims computed at the statutory rate in the District of Columbia of 6 per cent per annum on the unpaid balances of said claims from March 6, 1933, the date of the closing of the bank, until March 15, 1938, the date on which the final

10 per cent of the principal amount of said claims was paid; and that, after the payment of the remaining administrative expenses of the receivership, said interest must be paid in full to the depositors and creditors before any of the remaining assets of the bank may be turned over to appellant Cooper and the other shareholders. Since the remaining funds of approximately \$175,000 are substantially less than the total amount of interest due the depositors—a sum in excess of \$204,000 (Joint App. pp. 19, 21, 40)—it is obvious that even they cannot be paid in full.

Finally, it will be noted that this receivership is the last bank receivership in the District of Columbia under the Comptroller of the Currency dating back to the banking holiday of March 1933; and that the present proceedings constitute the final phase of an extended and bitterly contested suit—the last of a series of cases involving the rights and claims of the depositors and shareholders of this bank. Except for this extended litigation the receivership would long ago have been closed. Appellee now believes that a decision has finally been rendered correctly determining once and for all the rights and claims of said depositors and shareholders. It follows that the judgment of the District Court in sustaining appellee's Motion for Summary Judgment and granting the declaratory relief sought therein should be affirmed.

Respectfully submitted,

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APPENDIX "A".

Memorandum Opinion of Mr. Justice Bailey in Case of McKinley High School Bank v. Delano, C. A. No. 17,348.

In the District of the United States
For the District of Columbia

(Filed December 8, 1943)

Civil Action No. 17,348

McKINLEY HIGH SCHOOL BANK, *et al.*, *Plaintiffs*

v.

PRESTON DELANO, *et al.*, *Defendants*

The cross complaint was filed in this case by one defendant against a co-defendant, seeking to set aside in part an order of the court in Civil Action 13,587; to restrain the defendants to the cross complaint from further dissipation of the assets in their hands; to set aside the opinion and order of the U. S. Court of Appeals for the District of Columbia in the case of *U. S. Savings Bank et al. v. Morgenthau*, No. 6605 of that court; that the remaining assets in the hands of the defendants to the cross complaint be delivered to the stockholders of the U. S. Savings Bank and for general relief.

The cross plaintiff also seeks to amend the cross complaint seeking to set aside, in addition to the opinion and order of the Court of Appeals above referred to, all orders and decrees of this court in the same case made pursuant to the mandate of the Court of Appeals.

As to the relief sought by the cross plaintiff with reference to the order of this court in Civil Action 13,587, that question has become moot by reason of the decision of the Court of Appeals in the cases of *Cooper v. Goldsmith, et al.*, and *Fraser, et al. v. Goldsmith, et al.*, decided May 20, 1943.

The remaining relief sought has become *res judicata* by reason of the decision of the U. S. Court of Appeals in the

cases of *Cooper v. Woodin, et al.*, 63 App. D. C. 311, and *U. S. Savings Bank v. Morgenthau*, 66 App. D. C. 234. It may be added that the rate of interest to which the depositors are entitled is governed by 28-2701 of the D. C. Code. See also *Richards v. Bippus*, 18 App. D. C. 293. In view of this it would seem that the fact that the bank had been paying 3 per cent interest on some of the deposits is immaterial so far as the question of the rate of interest after the closing of the bank.

The amended cross complaint also seeks to set aside the decree of this court dismissing the appeal in Equity No. 57,344, together with all other decrees of this court as a result of the mandate from the U. S. Court of Appeals for D. C. as well as any and all decrees of said U. S. Court of Appeals in said case. If the cross complaint and its amendments are filed in lieu of a bill to set aside a decree for fraud none of the facts stated in the cross complaint are sufficient to maintain such a bill. The matters of fraud charged are not extrinsic to the suit.

In the case of *United States v. Throckmorton*, 98 U. S. 61, 65, it is said:

“ * * * If a new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. * * *

“But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar

cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. * * *

“In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

“On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. * * *”

If the cross complaint be treated as in the nature of a bill of review, based on newly discovered evidence, leave must first be obtained from the Court of Appeals. In *Southard et al. v. Russell*, 16 How. (57 U. S.) 546, the Supreme Court, at p. 570, said:

“Nor will a bill of review lie in the case of newly-discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose.”

See also *National Brake Co. v. Christensen*, 254 U. S. 425, and *Ex parte Thomas, et al.*, 73 App. D. C. 50.

The cross complaint will be dismissed.

sgd/JENNINGS BAILEY
Justice

APPENDIX "B".

**Excerpts from Pre-Trial Order in Case of Elliott v. First
Inland Nat. Bank of Pendleton, Or., 32 F. Supp. 839.**

In the District Court of the United States
For the District of Oregon.

Civil Action No. 194.

Pre-Trial Order.

RAYMOND L. ELLIOTT, Receiver of The First Inland National
Bank of Pendleton, Oregon, a national banking cor-
poration, *Petitioner*,

v.

THE FIRST INLAND NATIONAL BANK OF PENDLETON, OREGON, a
national banking corporation; JOHN D. ANKENY; F. S.
LEGROW; JOSEPH CUNHA, SR.; GILLANDERS & BUR-
ROUGHS, a corporation; WILL M. PETERSON; S. R.
THOMPSON, *Defendants*.

This matter coming on for Pre-Trial on this 3rd day of November, 1939, before the Honorable Claude McColloch, one of the Judges of the above entitled Court, the petitioner appearing by George R. Lewis, his attorney, and the answering defendants, John D. Ankeny, F. S. LeGrow, Joseph Cunha, Sr., Gillanders & Burroughs, a corporation, Will M. Peterson and S. R. Thompson, appearing by T. P. Gose and John F. Kilkenny, of counsel. The parties appearing as aforesaid entered into the following stipulations in open Court:

STIPULATIONS.

It is stipulated and agreed between the parties as follows:

I.

That at all the times and dates herein mentioned, The First Inland National Bank of Pendleton, Oregon, one of

the above named defendants, was and now is a national banking corporation, organized and existing under and by virtue of the laws of the United States of America.

* * *

III.

That on and prior to the — day of October, 1931, The First National Bank of Pendleton, a national banking corporation existing under and by virtue of the laws of the United States of America and The Inland Empire Bank, a state banking corporation, organized and existing under and by virtue of the laws of the State of Oregon, were doing a banking business in the City of Pendleton and in Umatilla County and other surrounding counties in the State of Oregon; that on said day, the bank examiners for the State of Oregon and for the United States of America issued an ultimatum to the officers of both institutions to the effect that neither the said First National Bank of Pendleton or the Inland Empire Bank could open its doors on the following Monday morning unless additional capital was placed in both institutions; that at said time the bank examiners found both banks insolvent and threatened to place the same in the hands of a receiver if additional capital was not obtained; that at said time a large group of business men in Umatilla County and surrounding counties realized that if the said institutions were closed it would be disastrous to the community, and that the depositors of both institutions would suffer a huge loss; that at said time it was evident that if the assets of the institutions were liquidated in the fall of 1931, at the then prevailing low prices for wheat and other agricultural losses, the depositors and the community at large would suffer a shocking loss; that thereupon the said group of business men worked through Saturday night, all day Sunday and well into Sunday night in an attempt to secure sufficient money and place the same in an institution so as to satisfy the said bank examiners; that due to the efforts of this group of men and the assistance of the examiners, they raised among themselves and

among others a total sum of \$500,000.00, \$400,000.00 of which was represented by capital stock in a new organization The First Inland National Bank of Pendleton, and \$100,000.00 in surplus; that after the raising of said money, the new institution The First Inland National Bank of Pendleton was organized and took over the assets and all of the liabilities including the deposits of the two old institutions The First National Bank of Pendleton and the Inland Empire Bank; that it was principally through a deep sense of loyalty to the community and to the depositors in the two old institutions that the new stockholders took the stock in the new institution; that the said group of men subscribed for said stock principally to save the community and save the depositors from a shocking loss; that if the assets of the two old institutions had been liquidated at said time, the community and the depositors of said two old institutions would have suffered a very severe loss; that the bank examiners forbid the subscribers to the stock in the new institution from using any money they might have on hand in the two old institutions; that the said money could not be used by said subscribers for the purpose of buying the new stock; that the said subscribers including these defendants and all the other stockholders in most instances were compelled to borrow the money with which to purchase said capital stock in the new institution and pay interest thereon until they could find other methods of financing. (The petitioner in admitting the truth of this paragraph does not admit the materiality or the competency of the matters therein admitted.)

• • •

V.

That the contract between the said The First Inland National Bank of Pendleton and the savings accounts of depositors hereinafter mentioned provided that such depositors were to receive interest at the rate of 4 per cent per annum.

• • •

VII.

That on the 17th day of October, 1932, the Mayor of the City of Pendleton, by proclamation, declared a holiday in the City of Pendleton, Umatilla County, Oregon. * * *

That on the 2nd day of March, 1933, the governor of the State of Oregon by proclamation declared a banking holiday which said proclamation was in words and figures as follows:

* * *

That on the 6th day of March, 1933, the President of the United States declared a banking holiday, which holiday did not expire until the — day of March, 1933.

* * *

IX.

That on the 22nd day of March, 1933, one Edwin Winter was appointed by the Comptroller of the Currency of the United States of America to act as Conservator for the said The First Inland National Bank of Pendleton, Oregon; that the said Edwin Winter thereupon took charge of the affairs of said banking corporation and remained in possession of the assets and affairs of said bank until the first day of February, 1934.

* * *

XI.

That on the first day of February, 1934, the said The First Inland National Bank of Pendleton, Oregon, a national banking corporation, was insolvent, and the Comptroller of the Currency of the United States on said date found and declared that said bank suspended business on the 17th day of October, 1932, and the Comptroller of the Currency on February 1st, 1934, took possession of said bank and all of its assets and on said date appointed one Charles Reynolds as receiver of the said The First Inland

National Bank of Pendleton, Oregon, a national banking corporation. (The defendants, however, in admitting the foregoing do not admit the materiality or the competency of the allegation to the effect that the Comptroller of the Currency of the United States on said date found and declared that said Bank suspended business on the 17th day of October, 1932.)

* * *

XIV.

That from time to time dividends were paid by the Receiver on the creditors' claims filed and approved against said banking institution, so that the principal of said claims was paid in full on the 22nd day of December, 1937; that nothing remains due and unpaid on said claims except the interest that may be due and payable thereon.

XV.

That subsequent to the appointment of the Receiver as aforesaid, an assessment was made against all of the shareholders of said bank in order to collect the double liability of said shareholders; that the capital stock of said corporation subscribed and paid for by said shareholders was \$400,000.00; that the Receiver has collected on the double liability the sum of \$391,372.51; that the estimated value of the assets remaining in the hands of the Receiver for the payment of claims is \$460,000.00.

* * *

XVII.

That an actual controversy exists between your petitioner, the Receiver of The First Inland National Bank of Pendleton, Oregon, a national banking corporation, and the shareholders of said banking institution, the defendants above named; that the petitioner acting in behalf of said depositors claims and contends that said depositors are

entitled to interest at the rate of 6 per cent per annum on the principal of their claims since the 17th day of October, 1932, to and including the 22nd day of December, 1937, the date of the last payment of principal on the said claims.

XVIII.

The answering defendants contend that no interest should be allowed or permitted on the general deposit claims (1) during the period the bank and its officers were observing the Mayor's holiday; (2) during the period the bank and its officers were observing the Governor's holiday; (3) during the time the bank and its officers were observing the Presidential holiday, and (4) during the time the Conservator was in charge of the institution and in possession of its assets.

XIX.

The defendants also contend that on the savings accounts and on the certificates of deposit, the claimants should not be allowed interest in excess of 4 per cent (the contract rate during the period the bank and its officers were observing the Mayor's holiday, during the period the bank and its officers were observing the Governor's holiday, during the time the bank and its officers were observing the Presidential holiday, and during the time the Conservator was in charge of the said institution and in possession of its assets.)

XX.

That in compiling the sums to be allowed on the claims of the depositors having certificates of deposit and time savings accounts, the petitioner accrued the interest on said accounts to the 17th day of October, 1932, and contends and maintains that the said depositors were entitled to interest at the rate of 6 per cent per annum on said deposits and on the accrued interest from that date; that in this connection the defendants contend that there is an unlawful com-

pounding of interest with reference to the accrual of interest on interest from the 17th day of October, 1932, to the 22nd day of December, 1937, and that the petitioner should not be allowed to compound interest on the said certificates of deposit and savings accounts.

* * * *

Done and dated this 3rd day of November, 1939.

(S) CLAUDE MCCOLLOCH,
District Judge.

Approved:

(S) GEORGE R. LEWIS,
Attorney for Petitioner.

Approved:

(S) JOHN F. KILKENNY,
*One of Attorneys for Answering
Defendants.*

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APPELLANT'S REPLY BRIEF

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
October Term, 1945 DISTRICT OF COLUMBIA

FILED JAN - 4 1945

No. 8872

Joseph W. Stewart

CLERK

WADE H. COOPER, *Appellant*

VS.

R. C. PARSONS, Receiver of the United States
Savings Bank, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

WADE H. COOPER

University Club

Washington, D. C.

Attorney for Appellant

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

October Term, 1944

No. 8872

WADE H. COOPER, *Appellant*

vs.

R. C. PARSONS, Receiver of the United States
Savings Bank, *Appellee*

REPLY BRIEF FOR APPELLANT, WADE H. COOPER

Appellee in his brief (P. 2) says that Appellant's Statement of the case is in some instances misleading,—as where he refers to the payment of 100 percent to the depositors within a composite or aggregate period of 13 months. In reply, permit us to say that prior to its printing this Statement of the case, as well as the Summary of Argument, was submitted to Mr. H. Donald Kistler, who has been doing the work for Appellee, and at his suggestion the verbage on line 14, Page 2 of our first brief was changed to read, "equivalent to 11 months during the conservatorship and 13 months during the receivership." We think we can produce the manuscript, if necessary. But what is the difference? Appellee is asking for interest for 11 months during the conservatorship, and for 13 months during the receivership. The receiver was appointed Feb. 10, 1934, and in a composite period of 13 months 100 percent was paid.

Of course, the liquidation was as slow as the former Comptroller could make it, even refusing to disburse the money when he had it in hand, as pointed out on Pages 43 and 44 of Appellant's first brief. It is shown, for instance, (Page 6, Joint App.), that on April 23, 1934 the former Comptroller borrowed \$1,080,000. but did not distribute it until June 28, 1934. It is also shown (Page 6, Joint App.) that in March 31, 1935 the former Comptroller borrowed \$775,000. but it was not distributed until Oct. 22, 1935, or for a period of about six months and twenty days, (Joint App., Page 6), when only 15% was paid, leaving a balance in cash on hand of \$281,846.96. None of these statements are denied or explained but are referred to as "immaterial and irrelevant" in the motion of Appellee to strike, and in his brief as "impertinent" or "unfounded conclusions."

Appellee next states that in Feb. 1941 a plan of settlement was entered into between the receiver and the stockholders, but that the plan was later repudiated by Appellant Cooper and was attacked by certain depositors with the result that said plan was ultimately set aside by this Court in *Cooper and Fraser, et al. v. Goldsmith, et al.* (No. 8369 and 8370) 77 U. S. App. D. C. 392, 135 F. (2d) 949. Let us see what the facts were and are. This plan of settlement was suggested and prepared by the present Comptroller's office. Appellant Cooper agreed to it with the following reservation—

"I sign this with the following understanding: That the 12.55% is for the purpose of this agreement only; (2) that the stockholders and depositors reserve the right to take such action as may be necessary to bind all depositors." (to accept 3%), signed, Wade H. Cooper.

The Comptroller claimed 12.55% was due as interest, but we denied it. Appellant Cooper has always insisted, if possible, that all depositors receive the same rate of interest which was, by the agreement to be 3%. The Comptrol-

ler did not object to this reservation to bind all depositors, until after Appellant Cooper had spent about \$2,000 in a canvass of the depositors. Then after the canvass had closed he or his office opposed the payment of 3% to all, but insisted upon 12.55% to those depositors who could not be found or had not signed the agreement. All these facts appear in *Cooper & Fraser et al. v. Goldsmith, et al., Supra*. Appellant Cooper, as the result of persistent urging, finally agreed that if Judge Bailey approved such a settlement he would not oppose it, but Judge Bailey referred the matter to Judge Luhring under an order *nisi*. Thereupon Appellant Cooper opposed the plan vigorously, as he thought it grossly unfair to pay one set of depositors 3% and another set 12.55%. Judge Luhring finally refused his approval, though the Comptroller's office was doing its best to secure his approval of the plan. When the Comptroller or his attorneys decided that Judge Luhring would not approve the plan, because of the opposition of Appellant Cooper, and 125 or 130 depositors, his attorneys caused a letter to be sent to Judge Luhring, signed by the First Deputy, saying,—

“* * * this office feels that such doubt should be resolved in favor of the objecting depositors and that the proposed plan of settlement should not be approved and the litigation should thereupon be proceeded with for the purpose of enforcement, in full, of the liability of the shareholders of the bank upon the assessment heretofore levied by the Comptroller of the Currency.”

Judge Luhring, as stated, finally refused to approve the plan. Then what happened? These same attorneys, for the Comptroller, in collusion with a few small stockholders, with the active backing of the Comptroller's office, cooperated with these small stockholders the very next day in filing a Declaratory Judgment bill, seeking to undo the very thing they had asked Judge Luhring to do. The attorneys for the Comptroller appeared openly in the lower

Court, as well as in this Court, and urged the approval of a plan characterized by Appellant Cooper as "unfair, fraudulent and void" and an imposition upon the people the Comptroller is charged with representing. We should add that when Judge Luhring's decision was published in the newspaper, that this letter from the Comptroller's office was published along with it, the purpose being to make it appear to the public and the depositors that the Comptroller had caused his own plan to be defeated because of its unfairness. Could Machiavelli in his prime beat that? The whole purpose was to avoid a trial of this case on its merits, regardless of the depositors. They have shown that they are not interested in the depositors in the slightest degree, but only in preventing a trial on its merits.

Appellant Cooper had hoped to avoid this, but we had as well tell the whole truth in order that this Honorable Court may get a clear conception of the situation in this case. We speak now from the records only,—

In the District Court of the United States, in Equity No. 55933, Page 18 of the Special Master's Report (Park Savings Bank Case) we find the following:

"Mr. Kremer (Kremer & Bingham) on behalf of himself and his associates as attorneys for the receiver who is cross-plaintiff in this suit claims a fee of \$35,000. in addition to \$17,500 already received on account of services rendered, for a total of \$52,500, all of which he and the receiver (the Comptroller) further claim should be paid out of the \$350,000. fund. Of this \$52,500 claimed, \$30,000 is recommended to be allowed."

It thus appears that Mr. Kremer's claim of \$52,500. was reduced by \$22,500, but the \$17,500 which he had already received was more than ample. This is cited as an example of the manner in which Bank assets are wasted and dissipated. On Page 12 of said report, \$37,500 each was allowed Hilton E. Jackson and Wm. E. Richardson for services rendered upon a contingent basis, nothing being allowed

for services rendered by them in connection with the first appeal. The report was approved by the District Court.

In the instant case the report of the receiver of March 31, 1937 (Ex. C, Joint App. 47 & 48), shows costs of liquidation\$138,317.80. It is admitted that costs of liquidation are now.\$235,000.00, (Joint App., p. 22) or an increase since Mar. 31, 1937 of\$ 96,682.20. So that as a result of this nuisance suit filed against the stockholders on Aug. 10, 1937 (Appellee's Br., p. 2), approximately\$ 96,682.20, has been dissipated and wasted. Add the..... 175,000.00

cash on hand, and we have total of\$271,682.20, or \$66,957.64 more than the alleged claim for interest, ...\$204,724.56, (Joint App., p. 21). Appellant will show that the liquidation could have been completed long prior to Aug. 10, 1937, the date of the institution of this nuisance suit, and could have been completed within 30 or 60 days thereafter, but was wrongfully and arbitrarily prevented by the former Comptroller.

Why was the former Comptroller unwilling to open the Bank, with over \$600,000 of slow but good paper to secure the \$150,000 he was demanding in cash, but perfectly willing to waste \$235,000 in alleged expenses? Does this show good faith?

Examiner R. O. Bishop in Equity No. 6202, this Court, April Term 1934, Cooper v. Woodin, p. 182 of the printed record, in speaking of \$302,000 real estate loans classified as slow, said,—

“* * * slow loans are those that are possibly in default, either delinquent interest or taxes.”

So in real estate loans alone the Bank had \$302,000 good but slow to secure the \$150,000 demanded by the former Comptroller.

Mr. Justice Letts.

Appellee complains (Pages 3, 4, his brief), in substance, that Appellant Cooper has done Mr. Justice Letts a great injustice in stating that he was denied a fair and impartial hearing, and

“the extent to which Appellant is forced to go in an effort to give color to his desperate accusation is exemplified by his misstatement of the proceedings involving the sale of the bank building.” (Mis. No. 40, District Court.)

We do not think it possible to make a statement suitable or satisfactory to these brilliant young men, and in our statement (Page 2, first brief), we distinctly stated,—

“We will endeavor to state the salient points as briefly as possible, relying upon opposing counsel to supply any important omissions.”

This is manifestly an attempt to draw a red herring across the trail. Appellant Cooper has always highly regarded both Judge Letts and Judge Bailey personally, but they are human beings and make mistakes like the rest of us, especially when prejudiced for or against a litigant. Appellant *never* charged Mr. Justice Letts with being prejudiced against him as stated by Appellee, but he did and does charge that he was prejudiced in favor of the Appellee (the Comptroller). Let us briefly review the facts:

Judge Letts had, on Dec. 7, 1943, signed an order approving the sale of the Bank Building for \$45,000 as urged by Appellee, to the C. & P. Telephone Company, a tenant in the building, paying \$500. per month rent, the sale to take place Dec. 23, 1943 during the Christmas holidays, (Joint App. 51). Perhaps we should have given all the details, but we referred to the final order (Joint App., p. 51) which we thought was sufficient though it does not recite the fact that the building was sold at auction nor does it recite the fact that the Appellee claimed that he had it appraised, and that \$45,000. was its “liquidating value,”—a “business-like way” to sell a building. Nor does the final order recite the fact that a better bid had to be obtained by 10:30 A. M.,

Dec. 23d, which was not done. Nor does it recite the fact that the property was sold at auction following the protest of Appellant Cooper. Only 15 days intervened between the signing of the order *nisi* and the date of sale and all cash was required. We omitted the petition and order *nisi* in the attempt to save the cost of printing. This record is 57 pages whereas it could have been 17 pages but for the refusal of Appellee to agree to a stipulation of facts.

Appellant Cooper filed a protest, claiming that it was not necessary to sell the building until it was determined what amount of interest, if any, was due, as the Comptroller had on hand cash of approximately \$100,000. or more than necessary to take care of any possible amount of interest due. The protest set up a number of different grounds. Judge Letts heard Appellant patiently and politely for at least 30 minutes and then promptly overruled him without hearing from the other side, and proceeded to sell the building at auction. Appellant was not consulted at all, though he understood some colored people were willing to pay \$100,000 for the building, but they required a little time to raise \$100,000 cash. The whole thing looked like an attempt by the Comptroller's office to give the C. & P. Telephone Co. the building for \$45,000 cash, but fortunately some of Appellant's colored friends intervened and caused the building to bring \$80,000 cash.

Is it possible that Judge Letts would sell the building, unless he thought it necessary? And how could it be necessary unless this fabulous claim for interest was allowed? With all due respect to our brilliant young friends, the logic of the situation is that Judge Letts was convinced that the building should be sold, and sold for the purpose of paying interest, the amount of which had not been judically determined, unless he had already determined mentally that the position of the Comptroller or Appellee was correct. Surely our young friends do not mean to charge Judge Letts with arbitrarily ordering the building sold when it

was wholly and totally unnecessary. Conversely, if he thought the sale necessary, the logic of the situation is that he had already determined in his own mind to do exactly what he later actually did do. Prior to this, he had had the case before him on different occasions. Our complaint is that following the sale of the building he should have voluntarily refused to hear the case any further, and by this we must stand regardless of the maledictions of our young friends. In addition, it is of record in this case that Judge Letts on Feb. 8, 1944, refused to permit certain depositors to file a petition urging a 3% compromise (Joint App. p. 2), in the face of the fact that the assets were being constantly dissipated and wasted pending this litigation, and had also in Feb. 1944 refused to consolidate the McKinley High School case (Civil Action No. 17348) with this case. In addition to this, he had on Jan. 6, 1944 denied a motion for judgment by default after a hearing on its merits, against the Comptroller in the case of Goldsmith *et al.* v. Delano, *et al.*, Civil Action No. 13587, in the District Court, when the Comptroller had refused to plead or answer, following a reversal of that case by this Honorable Court, the Comptroller's defense being that there was nothing to answer. It appeared to us that Judge Letts, very much against his own inclination, would have to grant the motion, but within about one week he overruled or denied the motion for a hearing and judgment by default, without any opinion or giving any reason for his action. The motion had been made by this Appellant as an intervenor in that case. The motion meant a trial on its merits, prior to entering the judgment by default, but Judge Letts prevented a trial on its merits, just as he has in the instant case. This Court will please take judicial notice of the different orders to which we have referred, as well as all the records in both cases. In addition to the foregoing, Appellant Cooper entered into an agreement to settle this nuisance assessment suit (Joint App. p. 53), on Feb. 14,

1944, for the reason that he was convinced that Judge Letts was prejudiced in favor of the Appellee (the Comptroller), and that he (Appellant) would make the settlement without surrendering any rights, as stated in his letter (Joint App., p. 53) in order to avoid the possibility of a judgment by Judge Letts. We do not believe that it will be denied that Judge Letts made inquiry, (not of record) following the settlement, if the agreement provided that Appellant Cooper should have a trial on its merits or words to that effect. Within a few days Judge Letts reported that he had read the compromise agreement and was convinced that the agreement did not so provide, which was correct, as Appellant only reserved all his rights under the law, and not as a favor from the other side. But Appellant was impressed with the fact that Judge Letts was leaning all the way toward the Comptroller's wishes. He had a right to favor the Comptroller personally, but he should have voluntarily stood aside and refused to hear this case at all, after a sale of the building, as already stated.

Further, Appellant understood that the Comptroller was seriously considering the disbursement of the cash on hand without waiting for a judicial determination of the questions involved, whereupon in reply to a letter of the Hon. John L. McMillan (S. C.) of the House of Representatives, of Jan. 21, 1944, Comptroller Delano, in his letter of Jan. 27, 1944, said:

“* * * since our last letter the Receiver has obtained the cash for the last remaining asset, the bank building. Col. Cooper has had his day in Court. The only remaining matter requiring the attention of the Court is *Parsons v. Barry*, which may be finally disposed of at the hearing set for Feb. 4th. Shortly thereafter the Comptroller should be able to authorize a final interest dividend to depositors which we presently estimate at approximately nine percent, which should close the Cooper matter.”

The Comptroller seemed to be confident of the result. Congressman McMillan replied in a letter of Feb. 2, 1944—

“ * * * He (Cooper) further states that on Dec. 23d last he had an arrangement with your Mr. McCandless to pay the 3%, but on Dec. 30th Mr. McCandless refused to deliver his (Cooper's) assignments in order to prevent him from paying the 3%. Why all this unnecessary expense and time and labor? The Courts would instantly approve a settlement of 3%. Why do you not do this? This, frankly, is the worst situation that has ever come to my attention, and, in my opinion, is going to result in serious trouble for all parties participating in your plan to disregard the law and the Courts, and become a law unto yourself. I cannot submit to any such methods.”

(Appellant intended to pay 3% to the depositors and needed the old assignments in *Cooper v. Goldsmith, et al.* (No. 8369), 77 U. S. App. 392, 135 F. (2d) 949, as a guide for name and amount, but he is still without them.)

Can it be said that the Comptroller is seeking to protect the depositors when he sought to force 3% upon one set and 12.55% upon another? The sole purpose is an effort to avoid a trial on its merits and to inflict all the punishment possible upon the stockholders, after they had denied themselves \$350,000 in dividends to protect the depositors. We do not believe this comes from Comptroller Delano, but from one man who has caused all this trouble, and who really seems to believe (and he is a nice man) that the stockholders should be punished for operating a sound and solvent bank, for Mr. Delano has stated that 3% appeals to him as being a fair settlement.

This is not a political or partisan matter. Congressman Gearhart (Rep.) of the Ways & Means Committee procured a statement of loans from the R.F.C. when Appellant could not obtain it elsewhere, and Congressman McMillan (S. C.) intervened when it appeared necessary, as well as the Chairman of the Banking & Currency Committee. Comptroller Delano in a letter of Feb. 17, 1944, agreed to give Appellant sufficient time for a judicial determination. In addition to the foregoing, when the McKinley High School case and the Goldsmith case were upon motion before Judge Letts,

this Appellant stated that the argument would consume more than 30 minutes, and according to custom the motions were transferred to Judge Bailey for hearing. Several days later we were again before Judge Letts, and we do not think it will be denied, (although not of record), that, apparently addressing his remarks to this Appellant, he stated that he did not propose to have counsel selecting the forum in which to hear their cases or their motions. Mr. Kistler and Appellant both stated that they were not guilty. Throughout all these proceedings the manner and demeanor of Judge Letts was correct in every way. It is a situation which reminds us of Lord Bacon's statement when the Earl of Essex presented him a country estate at Twickenham, "The noble manner of the presentation means more than the matter," but this is in reverse.

The noble manner does not remove or change the fact that he had prejudged the case when on Dec. 7th, 1943, he ordered a sale of the bank building, if not before, or why would he have ordered it? It is barely possible that Judge Letts would have reached a different conclusion had Appellant submitted to him all the authorities as he has to this Court, but he submitted ample.

Mr. Justice Bailey.

Appellee relies heavily upon the opinion of Mr. Justice Bailey in dismissing our counterclaim in the suit of the depositors, McKinley High School Bank, *et al.* v. Delano, *et al.*, Civil Action No. 17348 in the District Court,— a suit by a number of large depositors to set aside the plan of the Comptroller to pay some depositors 3% and the other depositors 12.55%, and to vacate and set aside the order of Mr. Justice McGuire approving same in Goldsmith, *et al.* v. Delano, *et al.* This plan, and order of Judge McGuire, was set aside by this Court of Appeals on May 20, 1943 in Cooper & Fraser, *et al.* v. Goldsmith, *et al.* (Nos. 8369 and 8370),

77 U. S. App. D. C. 392, 135 F. (2d) 949 and the case reversed. In the McKinley High School case Appellant Cooper had filed a cross-complaint, as stated by Judge Bailey (Appendix "A" P. 1 of brief of Appellee). Comptroller Delano moved to dismiss the cross-complaint of Appellant for the reason that the question involved had become moot by reason of the decision of the Court of Appeals in the Goldsmith case, vacating the final order of Judge McGuire, and for the reason that the relief sought in the cross-complaint was *res adjudicata* in the cases referred to in his ~~opinion~~ ^{motion}. Judge Bailey granted the motion of Comptroller Delano and ordered the cross-complaint dismissed for the reasons stated. Appellant Cooper thought Judge Bailey was correct on the moot question, but 100% in error in stating that the relief sought was *res adjudicata*, as not a single solitary fact was either alleged or singled out as having been previously passed upon, as all the authorities require. Appellant had filed a cross-complaint, the equivalent under the new rules of an original bill. Judge Bailey, in his opinion, talked about a bill of review in the case of newly discovered evidence, stating that permission must be granted. But this was not a bill of review, as he should have known, but an original bill or its equivalent. His decision is not binding upon any one in any case, except that particular case, as not a single fact was passed upon by the Court and none alleged to have been, as the authorities all require, as stated in our first brief (P. 48), and other authorities hereinafter cited under Arbitrary Acts. Judge Bailey appears to have gone out of his way in his statement that,—

“* * * the fact that the bank had been paying 3% interest on some of the deposits is immaterial so far as the question of the rate of interest after the closing of the bank.”

He would ignore and disregard the plain statute in such a holding. Judge Bailey should have voluntarily stood aside

and never heard the motion at all. When we called his attention, at the time, to the fact that he had previously, in *Cooper v. Woodin*, permitted the former Comptroller to wreck the bank, knowing that it was perfectly solvent, he seemed more determined than ever to hear the motion. He did hear it with the result as above announced, in accordance with our expectations. In a letter to Judge Bailey of Nov. 15, 1943, Appellant Cooper said,—

“I think highly of you and like you personally, but in the pending case growing out of the unlawful and fraudulent destruction of the United States Savings Bank, which long ago has shown itself to be about four times solvent, I cannot escape the fact that ten years ago, when the question of the reopening of this bank was before you, you stated in your opinion, that you did not see that the Comptroller’s position could be criticised for placing a ‘reopening bank on the same basis as a new bank,’ a rule which would wreck and destroy every bank in the United States at that time or this time or any other time, as that ruling meant all cash or its equivalent, contrary to the law, which fixes the cash reserve required to be carried by banks, and contrary to all human possibilities, if the bank is to function for the good of the community, as the law expects or requires of it.

“You also held that the Comptroller’s position that the depositors and not the stockholders, under the plan submitted, would be furnishing capital ‘to the extent of about \$150,000’, ‘So far as liquid or available assets were concerned,’ was not subject to criticism though their own Examiner, Mr. Wm. M. Taylor, had stated that the non-liquid or criticised assets had a value of about \$270,699.52 arrived at in this way, as testified by Mr. Taylor:

	<i>Good</i>
Slow \$235,188.32, of which 10% or 20% is not good	\$188,150.52
Doubtful \$165,099.78, of which 50% is good	\$ 82,549.00
Total, good	<u>\$270,699.52.</u>

All this appears in the testimony of Mr. Taylor, page 144, Vol. 3, Friday November 10th, 1933, Cooper v. Woodin, Equity No. 56143, and Mr. Taylor's statement of assets and liabilities, same case, Vol. 2, Thursday Nov. 9, 1933.

Then on Pages 144 and 145 Vol. 3, Same Case and same date (Nov. 10, 1933) Mr. Thomas, my Attorney, attempted to develop this situation when you said:

Q. 'Is not that simply a question of addition?'

Mr. Thomas: 'I think so, your Honor.'

The Court: 'I do not think you should take up time on that then.'

Mr. Thomas: 'All right, I withdraw it, your Honor. That is all.'

Right then and there it is clear that I lost the case, when these non-liquid assets could have been used and should have been used for the \$150,000.00 of Capital and Surplus required by the Comptroller, still leaving over \$120,000.00 of these good assets for undivided profits. This is the manner in which this Savings Bank, the best Bank in the United States, was wrecked and destroyed, though numerous banks all over this Country carry their capital and Surplus in the Bank building or in real estate loans which are usually good but slow or non-liquid."

"In view of the above facts and in view of the fact that the Comptroller was 100% wrong, and is charged with purposely and repeatedly falsifying the record, I doubted if you would care to preside in the pending cases, but follow the custom of the Supreme Court and stand aside."

In addition to the \$270,000 good, there were about the same amount of other assets classified as a loss.

But Judge Bailey could not be moved,—possibly he was correct in dismissing the cross-complaint, but certainly not because it was a bill of review or *res adjudicata* but because the relief sought in civil action No. 13587 had become moot and because the matters of fraud charged were not extrinsic to the suit as stated. It is not a violent assumption to presume that Judge Bailey and Judge Letts conferred about these cases, and that Judge Letts, as nice a man as he is, felt bound to follow the opinion of Judge Bailey regarding the interest rate.

We regret the time and space consumed in disposing of these red herrings, but it was a matter of principle. Now let us briefly reply to the argument of Appellee.

ARGUMENT.

I.

Ultra Vires Acts.

Appellant has already covered this point very fully in our first brief (Pages 15, 25). The statute is perfectly clear as printed in our first brief (Page 6).

“No banking institution chartered and authorized to engage in business under the laws of this State shall hereafter install or maintain any branch bank, or engage in business at any place other than its principal office in the State of West Virginia.”

The argument that the repealing statute of February 4, 1937, printed in our first brief (Page 6) shows that it was not intended that the above statute should apply to non-resident West Virginia banks is fallacious, as all the non-resident banks could have maintained branch banks in the State of West Virginia had they not been included. In the repealing statute in our first brief (Pages 6 & 7) this is made perfectly plain by the concluding paragraph

“but no non-resident bank shall operate or maintain any branch bank in this state.”

There is nothing whatever that is ambiguous about this statute. It was the positive law of the State of West Virginia and so regarded or there would have been nothing to repeal. Was the Legislature repealing a myth or something not in existence, or was it, in effect, repealing or modifying a real existing statute? To ask the question is to answer it.

“The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous.” “The ambiguity

must be in the context and not in the title to render the latter of any avail." (Cornell v. Coyne (1904) 192 U. S. 418, 430, and other cases cited in our first brief (P. 16).

The Congress of the United States repealed the double liability act of stockholders in National Banks in the year 1933, but the repeal does not mean that the law was never in existence or never intended. Neither is the argument convincing that the bank in the instant case, or that other banks continued to operate in the District, in ignorance of the passage of the prohibitive act of 1929. That Act has now been repealed, (Feb. 4, 1937), as to non-resident West Virginia banks.

ESTOPPEL. We have already shown in our first brief, (P. 21), that this Court has already held in *Dunn v. O'Connor, et al*, (1937) 67 App. D. C. 83, that—

"* * * there can be no doubt that the debts * * * created *ultra vires* the corporation, the stockholders of the Continental have an interest entitling them to maintain suit."

and see other authorities cited in our first brief, (PP. 22, 23). And this Court has already held in *Thompson v. Park Savings Bank*, 64 App. D. C. 308, 77 F. (2d) 955 (1935) that—

"The persons thereafter (expiration of the charter) dealing with the corporation as depositors were charged with knowledge of the terms of the corporate charter. They, therefore, knew either actually or constructively, that the Bank was not then authorized by its charter to proceed with a general banking business. Therefore they (the depositors) are estopped to claim the legality of the bank's actions and cannot hold the directors or stockholders liable individually or as partners."

If the depositors in the above case could not hold the stockholders of the Bank liable, it automatically follows that they could not hold the Bank liable. We think that the depositors would have a right to set up a trust *ex maleficio* or otherwise, in the assets, but that they would not be

entitled to interest, as the contract for interest, if any, is *ultra vires* and void as in the Park Savings case. Appellant desired by all means, that the depositors be paid in full 100%, but this is no argument for paying unlawful interest as urged by Appellee, especially after a waste of \$235,000 in alleged expenses.

We have already shown in our first brief (P. 22) that the cases cited by Appellee have no bearing on the instant case on the question of estoppel. They refer to *Deitrick v. Greaney* (1940) 309 U. S. 190, 84 L. ed. 927. But this case says,—

“Equity will not permit one to rely on his own *wrongful* act.”

There is no suggestion of wrong in the instant case. This is all discussed in our first brief (PP. 22, 23).

“The object of a prohibitory law (as this is) cannot be defeated by estoppel nor the legally impossible accomplished.” C. J. 1228, Annotations.

“A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the doctrine of estoppel.” (*Union Pas. RR Co. v. Chicago R. I. & P. RR Co.*, 163 U. S. 564 (41:265) (271).)

This case is about as strong as the principle could be stated.

DIVIDENDS: Appellee insists that as the bank paid dividends as high as 40%, therefore, Appellant should be denied the right to the few crumbs that are left. But Appellee is careful not to give us credit for denying ourselves dividends to the extent of building up slowly but surely a surplus of \$350,000 more than the 20% required by law, in order to protect the people who had trusted us.

“The directors of any bank may annually, semi-annually or quarterly declare dividends, but such bank shall, before the declaration of any dividend, carry one tenth part of the net profit accrued to its surplus fund until the same shall amount to twenty percentum of its capital stock.” Barnes Code, W. Va. 1923 Acts 1913, Ch. 21.

So that when a dividend of 40% was paid it was the earnings upon \$100,000 capital and approximately \$400,000 surplus or around 8% upon the capital and surplus. They would deny us the right to the earnings upon the surplus created by our self-denial, in order to protect our depositors. Can it be possible that such a gentleman as Comptroller Delano impresses us as being, endorses or authorizes such methods as this? We hope not. This Appellant has taken over more banks in the name of "consolidation," to assist the Comptroller and prevent closings than all the bankers combined, in the city of Washington, as the records in the office of the Comptroller will show. Appellant has responded to the calls of the Comptroller in the dead hours of the night to prevent him having to place a sign on the door,—“Closed by order of the Comptrolrier.” And what we get in return is an attempt to change the law by judicial legislation, and to suppress the material facts in disregard of the law, in a bold attempt to defeat justice.

II.

Rate of Interest, if Any.

Appellee next devotes about 20 pages in citations of National Bank cases and argument that the depositors are entitled to interest. This is like carrying coal to Newcastle. We have not questioned the right of the depositors to interest, if the suspension and liquidation is not infected with bad faith and is not arbitrary or fraudulent. But in our first brief we have shown that the suspension and liquidation were both arbitrary and fraudulent (Joint App., p. 3). We have also shown in our first brief (p. 37) that the rate of interest, if any, is according to the D. C. Statute as stated by Chief Justice Fuller for the Supreme Court in *Washington & Georgetown RR Co. v. Harman*, 147 U. S. 290:

“It is conceded that at common law, judgments, whatever the cause of action, did not bear interest,”

and then referring to an act providing for interest in all judgments in the Circuit or District Courts of the United States:

“at the rate per annum as is allowed by law in judgments recovered in the Courts of such State,” he says this Statute— “is wholly inapplicable. Whatever the law of the District of Columbia is, upon the subject of interest controls, of course.”

We have already shown in our first brief (P. 27) that under the D. C. law no interest is due on the demand deposits, as a result of an agreement. See the Statute in our first brief (P. 7). And on savings deposits, our first brief (P. 29) that 3% by agreement is to be paid. (See the Statute (P. 7) our first brief.) And that, according to the Comptroller's interpretation, our first brief (P. 40), no interest is due during the conservatorship, and other authorities cited, first brief (P. 36).

Mr. Justice Letts was mistaken in stating that Appellant contended that the law of West Virginia controlled as to interest, as we distinctly stated that the D. C. law controlled (Joint App. P. 5). The Appellee relied mistakenly upon the West Virginia law and the National Bank Act (Joint App. P. 1) though neither the law nor the Courts of West Va. required payment of interest until *Hoffman v. Unger* (W. Va. 1943) 24 S. E. (2d) 911. But this holding would not apply to the instant case in any event, as it would be an impairment of the obligations of a contract. The interest rate in West Va. is according to contract before and after maturity as stated in our first brief (P. 34). No change was made in the rate in *Hoffman v. Unger*, *Supra*. And in West Virginia, the rate has, by law, been made the same in insolvent banks as in going banks, for deposits by the State, (our first brief P. 34). Appellee insists that *Richards v. Bippus*, 18 App. D. C. 293:

“although decided just prior to the enactment of the above noted code provision, (Sec. 28-2701) is persuasive if not controlling on this question.”

We have already explained (first brief P. 28), that Sec. 28-2701 was enacted *after* the Richards v. Bippus decision. This argument is on a parity with the argument that the *ultra vires* or prohibitive statute of 1929, already discussed, was ineffective or not the law, though it was definitely repealed in 1937.

Further, this Richards v. Bippus decision appears to be squarely contrary to the decision in the case of Washington & Georgetown RR Co. v. Harman, *Supra*. This case was decided in 1893 whereas the case of Holden v. Trust Co., 100 U. S. 72, 25 L. ed. 567, cited in support of the Richards v. Bippus decision was in 1879, or a number of years prior to the RR. Co. v. Harman decision. We have been wholly unable to find any D. C. case sustaining the Richards v. Bippus decision, either prior or subsequent to the decision in that case, since the opinion of Chief Justice Fuller in the RR. Co. v. Harman, *Supra*, wherein, in discussing the D. C. Act of April 22, 1870, which was the law, he said:

“There is nothing to indicate a legislative intention to declare that *all* judgments and decrees should thereafter bear interest by virtue of the Statute, or to make any change in that respect. * * * Judgments bore interest in actions founded on contracts as provided by the Act of 1812.”

Therefore, the Richards v. Bippus case did not follow the law as laid down by the Supreme Court in 1893, but followed Holden v. Trust Co. in 1879. Opposing counsel have not been able to produce one single case to sustain the Richards v. Bippus decision, either before or since, as already stated. We thought that the case of Presby v. Thomas (App. D. C. 171 (1893)) and Lockwood v. Lindsey, 6 App. D. C. 396 (1895) sustained Richards v. Bippus as stated in our first brief (P. 25), but upon further examina-

tion they do not by any means. The *Richards v. Bippus* opinion seems to be a "Lone Wolf" running at large in the Judicial Forest, but our Court of Appeals quotes with approval in *Gray v. District of Columbia* (June 6, 1893), 1 D. C. App. 20, the decision in *RR Co. v. Harman*, *Supra*, as stated in our first brief (P. 38).

While the legislative history is not clear, these sections of the D. C. Code of 1940 referred to were likely enacted for the very purpose of correcting the mistaken opinion in *Richards v. Bippus*, as it followed a Supreme Court opinion of 1879 instead of the opinion of Chief Justice Fuller in 1893, which declared that:

"Judgments bore interests in actions founded on contracts."

Therefore Sec. 28-2701 of the 1940 D. C. Code when considered in connection with the opinion of Chief Justice Fuller in the *RR Co. v. Harman*, *Supra*, clearly refers, it appears, to judgments for interest *founded upon contracts*. There first must be a contract to pay interest, and, if the rate is omitted, then the legal rate of 6% prevails. All the English and American cases hold that there must be a contract to pay interest, and as the payment of interest is in derogation of the common law, the contract or the law which compels its payment *must* be clear and free from ambiguity. The Honorable Court will observe that Sec. 28-2801 does *not* say all judgments and decrees, but—

"the rate to be allowed in judgments and decrees," or simply fixes a legal rate to be paid where the contract called for interest but failed to fix the rate.

EQUITY. In our first brief (PP. 32, 33, 34, 35, 36), we cited numerous cases showing that Law and Equity have concurrent jurisdiction in such situations or circumstances as we find in the instant case. In addition to the cases already cited, we find that in the case of *Merrill, Receiver of First Nat'l Bk. of Palatka, Fla. v. Nat'l Bank of Jacksonville*, 173 U. S. 129, Chief Justice Fuller delivered the opinion for the Supreme Court saying:

"It is contended that the bill should have been dismissed because of adequate remedy at law, and on the ground of laches and estoppel. As the controversy involved on what basis dividends should have been declared, (as here), and therein the enforcement of the administration of the trust in accordance with law, we have no doubt of the jurisdiction of equity."

Appellee does not deny that this Court has equitable jurisdiction in the instant case.

Opposing Counsel appear to be very much confused in their citation of cases of different jurisdictions in different parts of the country as to the rate of interest. We have already pointed out in our first brief (P. 26) that Appellant charged, and Appellee admits, that the demand depositors were not to receive any interest by agreement, and that the savings depositors were to receive 3% interest by agreement. And in our substituted counterclaim (Joint App. P. 5), Appellant charged that, if any interest whatever is due, which is denied, it is according to the contract rate as provided in Sec. 28-2707 of the D. C. Code of 1940.

Appellee admits in his answer (Joint App. P. 18) the correctness of Sec. 28-2707, but denies "the legal conclusions" of Appellant or that the statute means what it says, and then pleads and relies upon Sec. 28-2701 as to demand deposits and then the Nat'l Bank Act. We have already shown from the Supreme Court decision in *RR. Co. v. Harmon*, supra, that the Nat'l Bank Act is "utterly inapplicable," and this Court of Appeals, as we have shown, has at different times in recent years held to the same effect. The two sections of the Code of 1940 control in this situation beyond question, and, regardless of the Nat'l Bank Act, law and equity both require a ratable distribution of the principal, but certainly not as to interest, as the interest rate depends wholly upon the agreement entered into with the different depositors or creditors. The two sections referred to were enacted by Congress in 1901 whereas the Nat'l Bank Act was enacted in 1878. If

is any conflict the last statute enacted controls. But these two sections were enacted exclusively for the District of Columbia and apply to all persons and corporations without distinction or discrimination, as these brilliant young men must know.

They also insist that *Kimball v. Williams* (1910), 36 App. D. C. 43, which holds that "acceptance of principal presumes waiver of interest," does not apply in the instant case. Well, does it or not? This Court has never yet held that it does not apply, and this Court is the Supreme Court for the District of Columbia. They rely upon *Stein v. Delano*, 121 F. (2d) 979, where the Circuit Court of Appeals stated that the rule of waiver of interest

"does not apply in receiverships for the reason that during the administration, nothing could have been accomplished by a formal demand for interest. Until the *principal* of all claims are paid it cannot be known whether the estate would have enough remaining assets to make payment upon the interest * * *." (Italics supplied.)

But pending the receipt of the last payment of 100%, there is nothing to prevent a contemporaneous request or demand for interest. There is neither reason nor logic in the suggestion that this Court should nullify its previous holding in *Kimball v. Williams* (our first brief P. 28), to the effect that the acceptance of 100% of the principal "presumes waiver of interest," as all creditors upon receipt of 100% could have at that time insisted upon further payment of interest. Prior to the payment of the principal, the situation was entirely different, as it could not be known if the remaining assets were sufficient to make any payment of interest as stated in *Stein v. Delano*, *supra*. The opinion of this Court is strongly fortified in *Stewart v. Barnes*, 154 U. S. 456.

MINUTES. Appellee caused to be printed (Joint App. P. 23) the minutes of the Bank Board meeting of Feb. 28, 1933, placing restrictions upon withdrawals on account of

a "run" on the bank. This was the only sensible and practicable thing to do. "Runs" are usually of short duration, and if the depositors realize that they are being treated alike or "ratable," as our young friends insist, then they are satisfied, as they were in this instance, as Appellant was on the floor himself. No bank ever fails where restrictions are placed on withdrawals. It is easy to discuss theories but when the condition confronts you, you must act, and it is the duty of an officer to act to save the bank and not suffer it to be destroyed. Immediately thereafter the Congress of the United States enacted a law, giving the Comptroller authority to put on restrictions, if necessary, (see the Act of March 1933), a vindication of our judgment.

SOLVENCY. A bank is never insolvent for placing restrictions upon withdrawals in case of a "run," but is usually regarded as insolvent when it is unable to meet its usual or regular demands. But even then, some authorities hold that it is not insolvent, if it has sufficient assets, but unable to convert them for some reason for which the bank is not responsible, as in the horrible depression through which we were passing in 1929-1933. A depositor may sue for his money, but that does not mean insolvency.

The Statement of the Bank of Sept. 30, 1932 (Joint App. P. 38), caused to be printed by Appellee shows the Savings Bank had a capital of.....\$100,000,
surplus and undivided profits of.....\$170,000.
and reserve for contingencies of.....\$ 23,000.,

or a total of capital and other assets equal to.....\$293,000.

This was according to the report of the bank examiner and accepted by the bank, though liquidation has shown a capital and surplus of over \$400,000, liquidating expenses being \$235,000 as already shown and \$175,000 cash left over after 100% payment, equal to \$410,000. And this in the face of bargain sales and compromise settlements of obligations.

“A bank is solvent when it has enough assets to pay within a reasonable time, all of its liabilities through its own agencies, although it does not have cash sufficient for its daily needs,” (9 C. J. S. 943, § 485, citing numerous authorities, including State and Federal Courts).

The Savings Bank had on hand much more cash than the law or rule of the Federal Reserve Bank required which was only 10% for demand deposits and 3% for savings. The Bank had 10% or \$160,000. cash on hand and could borrow \$300,000 more, according to Deputy Awalt, in *Cooper v. Woodin, supra*, PP. 114-115, printed record. We had a right to demand thirty days notice for savings (Joint App. P. 26), according to the rules as caused to be printed by Appellee, which gave us much more cash for demand, and the former Comptroller sought a sale of assets at face value of \$930,000, in *Cooper v. Woodin, supra*. As a matter of fact, there was not a bank in the United States for several months both prior and subsequent to March 4, 1933 that could have sold its assets for enough cash to pay 100%, not because the values were not there, but because of the depressed prices, a condition without precedent in all history. This was what prompted the moratorium by the President. The Chase Bank sold 100 million of preferred stock after it was reopened and other banks all over the country did likewise, according to their size and their needs, of all of which this Court will please take judicial notice.

JUDGE McCOLLOCH. The Appellee (P. 36, his brief) discusses the case of the Inland Nat'l Bank of Pendleton, Oregon, 32 F. Supp. 839, where the patriotic citizens contributed \$500,000 capital to a new bank (for the public good) and later paid an assessment of around \$400,000, enabling the receiver to pay 13% interest or something like that, as held by Judge McCulloch. We know nothing of the case, but it seems a travesty upon justice, that Judge McCulloch refused to consider the equities of the situation.

But, after all, Appellee says Judge McColloch followed the local statute of 6%, which Appellee seeks to invoke here, instead of our local statute. Appellee says Appellant has caused the loss of thousands of dollars by litigation, but fails to note the institution of this nuisance suit in 1937 and a loss of around \$96,000 since then in useless expenses, when the receiver had on hand around \$70,000 more than was needed to pay the fantastic amount of \$204,000 claimed for interest. They also failed to note the refusal of the former Comptroller to disburse the cash on hand, as shown (PP. 43, 44) in our first brief. They also failed to note the sum of about \$50,000 this firm (Kremer & Bingham) will have received out of the liquidation of this small bank, though Mr. Geo. P. Barse, former General Counsel for the Comptroller did practically, if not all, the work in the cases to which they referred.

If this Court will examine Misc. 40, Vol. 1 & Vol. 2 of the District Court, it will find that petition after petition, sometimes 10 or 12 per day, were filed for the purpose of exchanging good 6% notes for Home Owner Loan bonds; that instead of combining all of them into one petition, a dozen petitions would be filed, for exactly the same purpose, and a separate charge, manifestly, made for each by this same firm, or Mr. J. Bruce Kremer of this firm. A large part of Vol. 1 was consumed with this kind of thing, and it was not stopped until Mr. E. H. Gough, Deputy, ordered it stopped about 3 years ago. And, if this Court will examine Vol. 2 the Court will find that the liquidation could have terminated years before it did and that different items show large losses for failure to pay taxes and collect interest; of all of which this Court will please take judicial notice. Mr. Kremer was a very delightful man, but that does not excuse the former Comptroller for dissipating and wasting the assets of this Bank.

III.

Arbitrary Acts.

Appellant asks the Court to vacate and set aside the entire order of this Court, declaring the Savings Bank insolvent in the case of Bank v. Morgenthau, 66 App. D. C. 234, 85 F. (2d) 811, on account of deception practiced upon this Court in the hearing of that case, (Joint App., PP. 8, 9) and because of newly discovered evidence showing that the bank was arbitrarily and fraudulently liquidated (Joint App., PP. 3-11 incl.). We are not asking the Court to vacate that part of the order or opinion stating that the bank owes accrued interest, "since the date when the receiver took possession of it," unless the entire order is vacated and a new trial is ordered. Neither is the Appellee asking that it be vacated, but he is insisting that it does not mean what it says, and threatens to make payment of interest from the date of the conservatorship. If any part of the foregoing order is *res adjudicata*, all of it is *res adjudicata*. We are asking that the rate of interest, if any, be declared, but neither party has asked that a part of the order or opinion be vacated, unless all of it is vacated, as already stated.

It surpasses our comprehensive ability as to how any man, lawyer or layman, except as the result of prejudice, could honestly say that the acts and the facts stated are immaterial and irrelevant and *res adjudicata*, either factually or legally. The only question to be submitted to a jury is,—Was the Bank arbitrarily suspended by the former Comptroller on Feb. 10, 1934? Then, it is up to the Appellant to show by the facts and the circumstances that it was. When men meet behind closed doors and conspire to plunder you or destroy your property or your character, they do not shout it from the housetops. You have to take

time and watch the earmarks and follow the tracks of the offender, just as Appellant has done in this instance. We are not asking this Court to pass upon the facts, but simply to see that we have a trial on its merits, according to our Constitution and the laws of our country.

The Supreme Court has never yet defined what is meant by "arbitrary," but in *Adams v. Nagle* (1938) 303 U. S. 532, 82 L. ed. 999, the Court referred to the word "arbitrary" as an epithet and stated, by way of defining the word, that it would be arbitrary for the Comptroller to stubbornly refuse to obey the law or the statute. Therefore, Appellant set out the acts and the facts showing arbitrary action and in his prayer asks the Court to find that the bank was arbitrarily and fraudulently closed, based upon the verdict of the jury. The latter part of Rule 1 of the new Rules declare that these rules "shall be construed to secure the just, speedy, and inexpensive determination of every action," and therefore, if there is any technical error in the form of the charges by Appellant, then this Court should reverse with permission for Appellant to amend, in accordance with the suggestions of the Court, if any. Appellee has not raised any question as to form, but insists that they are immaterial, irrelevant and *res adjudicata*, when the counterclaim, the equivalent of an original bill, took special care to differentiate between newly discovered facts and former facts (Joint App. P. 9).

The Appellee did not and could not point out a single fact (new fact) that had ever been passed upon in any Court. There has never been a trial on its merits at any time. The authorities all agree that the new facts entitle Appellee to another hearing, assuming that he had ever had a hearing, as stated in our first brief (P. 48), to which we add:

"Notwithstanding the rules as to *stare decisis* and that a decision of an appellate court becomes the law of the case, on retrial, the Circuit Court of Appeals may

* * * reverse its earlier decision on writ of error, after retrial, the rule as to the law being largely one of convenience and policy." (See *Johnson v. Cadillac Motor Co.*, 261 F. 878.)

In *Messenger v. Anderson*, 225 U. S. 444, Mr. Justice Holmes, speaking for the Supreme Court said,—

"In the absence of Statute the phrase, laws of the case, as applied to the effect of previous orders on the later action of the Court rendering them in the same case merely expresses the practice of courts generally, to refuse to reopen what has been decided, not a limit to their power," citing *King v. W. Va.*, 216 U. S. 92; *Remington v. C. P. RR Co.*, 198 U. S. 95, 99, 111; *Gr. Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343.

"The jurisdiction of Courts of Equity to reopen and set aside former decrees on the ground of accident, mistake and surprise is well recognized and frequently invoked * * *." (*Dewey v. Stratton*, 114 F. 185 (5th Circuit).)

"A species of fraud frequently regarded as sufficient for equitable relief as misrepresentation." (39 Am. Jur. 670.)

Appellant charges misrepresentation in *Bank v. Morganthau*, *Supra*.

"An original bill in the nature of a bill of review to set aside for fraud a decree entered on a mandate from the Circuit Court of Appeals, may be filed without first obtaining leave of such Court," (*Richie v. Burke*, 109 F. 16, citing *Story's Equity Pleading* and *Daniel's Chancery Pleading and Practice*).

"* * * the plea is still open to the objection that it leaves to conjecture what was involved and decided in the former suit and is, therefore, insufficient to show estoppel by record." (*Whitaker v. Davis*, 91 F. 721, citing *Russell v. Place*, 94 U. S. 606, 610.)

"* * * but such relief (motion or bill of review) is not always adequate, and an *original bill* is a proper mode of seeking redress against a decree obtained by fraud or collusion or through mistake, accident or surprise." (*Cyc. of Proc.*, Vol. 4, p. 342.)

“* * * When new facts intervene (as here) before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issue is no longer the same, and consequently the former judgment cannot be applied in bar.” (24 A. & E. Enc., P. 829.)

“The estoppel of a judgment extends only to the facts as they were at the trial when judgment was rendered.” (*Id.*)

This Court, according to the authorities, has the inherent power to vacate and set aside its own order, for sufficient cause, without the necessity of an original bill, and enter a decree based upon the law and the facts instead of misrepresentation, fraud or mistake.

“Nor can such effect (*res adjudicata*) be given to a judgment where the court undertakes to decide a question (as here) not raised by the pleadings or submitted by the parties.” (C. J., Vol. 34, P. 768.)

The record shows that the counsel for the former Comptroller in No. 6605 *Supra*, stated that the first dividend of 65% and the second of 15% were the result of “capacity loans” based upon a statute of Jan. 31, 1935. These statements were not in the Pleadings and both are shown to be misrepresentations, as the former Comptroller in both instances, held the cash in hand for months, and in the 15% dividend for nearly seven months but refused to distribute it, (our first brief, PP. 42, 43).

“The decree, not being on the merits, could not be a bar to such subsequent suit in a State or United States Court.” (Swift v. McPherson, 232 U. S. 504) No. 6605 *Supra* was dismissed upon motion and not on its merits.

“Specific facts must be alleged to show the consideration and determination upon the merits.” (23 Cyc. of Law & Proc., citing numerous authorities.)

“* * * There can be and ought to be no repose of society where for such wrongs (as here) the Courts are incapable of giving redress * * *,” Graver v. Faurot, 76 F. 263.

"These and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and amend the former judgment or decree, and open the case for a new trial and a fair hearing." U. S. v. Throckmorton, 98 U. S. 95, citing authorities.

GROSS NEGLIGENCE. Appellant is not bound to disclose his evidence in his counterclaim, but he must enumerate the various acts showing the arbitrary and fraudulent action of the Comptroller, and for an accounting he must show good cause. Appellant has already shown that the former Comptroller purposely delayed a distribution as required by law. He has shown a dissipation and waste of approximately \$96,000 since this nuisance suit was instituted. He has charged a waste of a large sum as the result of gross negligence in the failure to pay taxes and collect interest. And while Appellant is not bound to disclose his evidence, for the benefit of the Court, he submits a short list showing gross negligence as charged and which he will prove:

46 Florida Ave., N. W.	Loss \$1,963.57;
1637- 4th St., N. W.	Loss 384.11
1917- 3rd St., N. W.	Loss 7,191.05
734 Hobart St., N. W.	Loss 2,214.27
4326 Hayes St., N. E.	Loss 385.25
800- 44th St., N. E.	Loss 822.41
5026 Ames St., N. E.	Loss 1,721.60
708 Morton St., N. W.	Loss 1,713.81
42-42½ Hanover St., N. W.	Loss 194.87
4830 Jay St., N. E.	Loss 2,516.38

In some instances taxes and interest had accumulated as much as approximately \$4500.00 as is illustrated in the case of 1917-3rd St., N. W. In the case of 1020, 1022, 1024 and 1026 You St., N. W. taxes had accumulated to the extent of \$3,107.96, and no interest paid since Sept. 15, 1937 (approximately \$7,000) on a loan of \$18,000. All these loans

were well secured by mortgage or trust deed on real estate, but the losses were the result of gross negligence in failing to collect interest, and pay taxes promptly. These illustrations show the degree of negligence used in administering the trust. In some instances large sums were paid to rid the property of tax liens. Of all of which this Court will please take judicial notice in Misc. 40, Vols. 1 and 2. And yet our brilliant young friends would deny us the few crumbs left though by our self-denial we made it possible to pay 100%, notwithstanding the waste of \$96,000 since the nuisance suit for which they are primarily responsible, plus about \$50,000 as above indicated, or a total waste of approximately \$150,000 in the administration of this small trust.

Trustee's Liability.

Opposing Counsel in their brief (P. 45) say:

"Surely there must be an end to his alleged right to relitigate these unfounded charges which have been previously determined against him." Let them point out a single "unfounded charge" and let them point out a single one of these charges which has "previously been determined against him." This statement is without the slightest foundation and is utterly false as they know that Appellant has been begging for a trial to determine these "unfounded charges" for years, which they have been seeking by any method possible to avoid the latest being to prevail upon Judge Bailey, when not a single fact or charge was pointed out as having been passed on, which renders Judge Bailey's order a nullity, as they know, except in that particular case, or Appellant would have entered an appeal.

Bogert on Trusts (Second Ed.) p. 334 says:

"The cardinal duties and therefore liabilities of trustees, are these: (1) To carry out the trust (2) to use due care thereabout; and (3) to act in good faith thereabout," citing a number of authorities. Continuing he says:

"That the trustee has not been requested to perform the trust, is no defense. He should proceed on his own initiative," citing authorities—Instead of proceeding, the trustee here (the Comptroller), sought to prevent and prolong the litigation, which makes him liable to the beneficiaries, the depositors or creditors—The depositors were not allowed by the lower court to come in and protect themselves. But surely the stockholders are not to blame for the misfeasance or malfeasance of the Comptroller for, if so, the estate being of sufficient size, the Comptroller could continue to dissipate and destroy it to the irreparable damage of the stockholders. It is unfortunate, but the Comptroller being the trustee for the depositors, they must stand in his shoes in the instant case, upon no higher ground than their agent and trustee stands—Therefore as between their loss, if any, of a few dollars interest and the large amount due the stockholders, the depositors or creditors should stand the loss caused by their agent and Trustee—This seems to be elementary law—The depositors cannot take the good without the evil, regardless of the argument to the contrary by opposing counsel.

Possible Solutions.

There are a number of solutions, legal and equitable, in the instant case.

LAW. (a) The acts of the Savings Bank were *ultra vires* following the Prohibitory Act of Feb. 28, 1929 (See concurring opinion of opposing counsel in first brief, P. 18).

(b) Appellee admits that the District law controls the rate of interest (Our first brief, P. 26), and appellee also admits in his motion for Summary Judgment (Joint App. P. 30) that the District of Columbia law controls. Therefore, the demand deposits, by agreement, would not receive any interest as there was no contract for interest as stated by Chief Justice Fuller in *R. R. Co. vs. Harmon*, 147 U. S. (our first brief, Pages 37, 38). The statute of 1870 dis-

cussed by Chief Justice Fuller is Sec. 713 of the Act of 1870 and is as follows:

“The rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as provided in this chapter.” Sec. 28-2701 did not change the law requiring a contract for interest, though the rate may be omitted.

(c) The Bank is not liable upon the payment of 100 per cent principal on demand deposits, unless the rule in *Kimball vs. Williams*, 36 App. D. C. P. 43 is changed, as in the absence of a contract the acceptance of 100 per cent presumes waiver of interest.

(d) The Bank is only liable on savings deposits at the contract rate of 3 per cent and only “*since the date when the Receiver took possession of it,*” as stated in *Bank vs. Morgenthau*, (66 App. D. C. 234).

EQUITY. (a) The Bank is not liable either in law or equity for the 11 months of the Conservatorship as stated in our first brief pages 40, 41.

(b) The Bank is not liable for 11 months for failure to convert assets and make distribution as stated in our first brief (Facts pages 41-45, and Law pages 32, 35).

(c) The Bank is not liable for failure to distribute cash on hand as shown in our first brief (Pages 41, 45).

(d) Equity would direct that all remaining assets be delivered to stockholders, as they denied themselves \$350,000 for the protection of the depositors, as stated herein and our first brief (Pages 23, 24).

(e) The Court could fix an equitable rate for all as the State of West Virginia did or refer the case to the Auditor. (See West Va. law, our first brief P. 34.)

(f) Or the case should be reversed and a trial on its merits ordered.

Conclusion.

Our Government was established for the protection, and not the destruction, of the property of the citizen. The members of this Court are sworn to obey the law and render justice to the rich and poor alike. Will this Court respond to the appeals and pleadings of the other side to cover up the fraudulent acts of the former Comptroller by sustaining their plea of *res adjudicata*? They are relying upon this Court to do that very thing, in utter disregard of the law and the authorities. We have confidence that this Court will not condescend to any such methods. Why should it? Why should this Court abuse its great power to cover up the frauds of another? Let him defend his own acts. Appellant will see that he is given every opportunity to vindicate himself.

Pope Pius XII in a remarkable Christmas message in 1943, referring to the basic rules that govern human society, made this observation,—

“They can be denied, overlooked, despised, transgressed, but they can never be overthrown with legal validity.”

To our Judges and our Courts is committed what Voltaire chose to characterize as “the most beautiful function of humanity,” beautiful because the fountain from which justice flows is pure and undefiled. On the base of the Gambetta monument in Paris is chiseled the legend,—

“None can forbid us the future.”

Therefore, the hour is yours, as a Court, to plan the course of the coming generations and to say whether ours is a government of laws or a government of vicious and selfish men. When the people lose confidence in our Courts, the corner stone upon which our government rests, revolution and anarchy will ensue and our Republic will go the way of all the ancient republics. “Cause and effect, means and end, seed and fruit,” Emerson warns us, “cannot be severed

for the effect already blooms in the cause, the end pre-exists in the means, the fruit in the seed." Plant the seed of lawlessness and corruption in our public officials, what will the harvest be? After all is said, we must all admit that there is profound wisdom in the admonition or adjuration, "Seek ye first the kingdom of God and his righteousness."

We have endeavored to discuss the law and the facts herein, fairly and justly, and we submit this case with confidence that this Court, under God, will conscientiously and courageously discharge its duty as it is sworn to do.

Respectfully submitted,

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